Supreme Court, U.
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No. _____

In The
Supreme Court of the United States

TULARE COUNTY, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*, NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* BILL LOCKYER, ATTORNEY GENERAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the heightened pleading standard applied by the circuit court in affirming the dismissal of Counts I-IV of the complaint which challenge the President's compliance with the Antiquities Act violates the notice pleading standard of FED. R. CIV. P. 8?

Whether the dismissal of Counts I-IV of the complaint pursuant to a heightened pleading standard deprived the plaintiffs of any meaningful judicial review of the President's compliance with the intelligible principles in the Antiquities Act and thus rendered the Act an unconstitutional delegation of Congressional authority?

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioners:

Tulare County, a county of the State of California; SierraNevada Access Multiple-Use & Stewardship Coalition, Inc., a California not-for-profit corporation; High Desert Multiple-Use Coalition, Inc., a California not-for-profit corporation; Sierra Forest Products, Inc., a California corporation; Kent Duysen, an individual; Sugarloafers Snowmobile Association, a California not-for-profit corporation; Fred Wiley, an individual; Eleanor and Herbert Foerster, individuals; Montecito-Sequoia Camp, Inc., a California corporation; Harold Kiper d/b/a/ Kiper and Kiper Logging, an individual; California-Nevada Snowmobile Association, Inc., a California not-for-profit corporation; and Navelencia Resource Conservation District, a special independent conservation district established under California law to promote conservation on both public and private land.

All of the above petitioners were parties to the proceedings before the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit.

Corporate Disclosure Statement Pursuant to Rules of the Supreme Court 29.6

The corporate petitioners state that there is no parent or publicly held company that owns 10% or more of the corporation's stock.

PARTIES TO THE PROCEEDING – Continued

Respondents:[1]

George W. Bush, in his official capacity as President of the United States of America; The United States of America; Ann M. Veneman, in her official capacity as the Secretary of the United States Department of Agriculture; The United States Department of Agriculture; Dale N. Bosworth, in his official capacity as the Chief of the Forest Service; The United States Forest Service; Jack A. Blackwell, in his official capacity as the Regional Forester for Region 5 of the Forest Service; and Arthur L. Gaffrey, in his official capacity as the Forest Supervisor of the Sequoia National Forest.

All of the above respondents were parties to the proceedings before the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit.

Intervenors/Respondents:

Natural Resources Defense Council, a non-profit corporation; The Sierra Club, a non-profit corporation; The Wilderness Society, a non-profit corporation; The Tule River Conservancy, a non-profit corporation; and

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), the names of the public officers, all of whom were sued in their official capacity, but who have ceased to hold office during the pendency of this action, have been substituted with the names of their successors.

PARTIES TO THE PROCEEDING – Continued

People of the State of California, *ex. rel.* Bill Lockyer, Attorney General.

All of the above entities moved to intervene in the district court proceedings. These motions were denied as moot when the district court dismissed the complaint. Thereafter, each of these entities was granted intervention directly into the circuit court proceedings.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
I. THE COURT OF APPEALS IMPROPERLY DEPARTED FROM THE NOTICE PLEADING STANDARD OF RULE 8 AND THE DECISIONS OF THIS COURT BY APPLYING A HEIGHTENED PLEADING STANDARD IN AFFIRMING THE DISMISSAL OF COUNTS I-IV OF TULARE COUNTY'S COMPLAINT CHALLENGING PRESIDENTIAL COMPLIANCE WITH THE ANTIQUITIES ACT	10
II. COUNTS I-III CONTAIN SUFFICIENT FACTUAL ALLEGATIONS UNDER RULE 8	11
III. COUNT IV ADDRESSES THE PERMANENT RESTRICTIONS IMPOSED BY THE PROCLAMATION AND CONTAINS FACTUAL ALLEGATIONS SUFFICIENT UNDER RULE 8	16
IV. THE COURT OF APPEALS' DECISION ON AN IMPORTANT FEDERAL QUESTION CONFLICTS WITH SUPREME COURT PRECEDENT	18

TABLE OF CONTENTS – Continued

Page

V. COUNT V OF THE COMPLAINT STATES A CONSTITUTIONAL CLAIM 22

VI. IN THE NINETY-SIX YEARS SINCE THE PASSAGE OF THE ANTIQUITIES ACT NO OTHER CASES UNDER THE ACT HAVE BEEN RESOLVED BY A MOTION TO DISMISS 23

CONCLUSION 25

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Anaconda Copper Co. v. Andrus, 14 E.R.C. 1853 (D. Alaska 1980) 23

Browning v. Clinton, 292 F.3d 235 (D.C. Cir. 2002) 21

Cameron v. United States, 252 U.S. 450 (1920) 23

Cappaert v. United States, 426 U.S. 128 (1976) 13, 23

Conley v. Gibson, 355 U.S. 41 (1957) 11, 20, 22

Crawford-El v. Britton, 523 U.S. 574 (1998) 11, 19, 20

Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) 19

Kimberlin v. Quinlan, 17 F.3d 1525 (D.C. Cir. 1994), *judgment vacated*, 515 U.S. 321 (1995) 21

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 11, 20, 21, 22

Mountain States Legal Foundation v. Bush, 306 F.3d 1132 (D.C. Cir. 2002) 9, 24

Sparrow v. United Airlines, Inc., 216 F.3d 1111 (D.C. Cir. 2000) 21

State of Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978) 23

State of Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945) 23

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) ...*passim*

Tulare County v. Bush, 185 F. Supp.2d 18 (D.D.C. 2001) 1

TABLE OF AUTHORITIES – Continued

Page

Tulare County v. Bush, 306 F.3d 1138 (D.C. Cir. 2002) 1, 19

Tulare County v. Bush, 317 F.3d 227 (D.C. Cir. 2003) 1

United States v. California, 436 U.S. 32 (1978) 23

United States v. Cappaert, 375 F. Supp. 456 (D. Nev. 1974) 13

Utah Ass'n of Counties v. Clinton, 255 F.3d 1246 (10th Cir. 2001) 24

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rules of Civil Procedure 8 ..... *passim*

Federal Rules of Civil Procedure 8(a) ..... *passim*

Federal Rules of Civil Procedure 8(f) 4, 14, 15, 19

Federal Rules of Civil Procedure 9 ..... 19, 21

Federal Rules of Civil Procedure 9(b) 19, 20, 21, 22

Federal Rules of Civil Procedure 12(b)(6) 9, 14, 15

Federal Rules of Civil Procedure 25(d) iii

Rules of the Supreme Court of the United States 29.6 ii

Property Clause of the Constitution of the United States, Art IV, sec. 3, cl. 2 ..... 2, 22

16 U.S.C. § 431 ..... 2, 4, 11

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C.

§ 1254(1) 1

§ 1331 5

§ 1361 5

§ 1391(e) 5

§ 2201 5

OTHER AUTHORITIES

Proclamation 7295, "Establishment of the Giant Sequoia National Monument," 65 Fed. Reg. 24095 (Apr. 15, 2000) ..... *passim*

Christopher M. Fairman, *Heightened Pleading*, 81 Texas L. Rev. 551 (2002) 16

OPINIONS BELOW

This matter has been the subject of three written, reported opinions. In conjunction with the United States Circuit Court of Appeals for the District of Columbia Circuit's denial of respondents' Petition for Rehearing *en banc*, the panel that decided the case attached a separate *per curiam* Statement of the Panel, which is reported as *Tulare County v. Bush*, 317 F.3d 227 (D.C. Cir. 2003) and is reprinted in the Appendix. App. 33-App. 34. The decision of the panel of the District of Columbia Circuit is reported as *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002) and is reprinted in the Appendix. App. 1-App. 10. The decision of the United States District Court for the District of Columbia is reported as *Tulare County v. Bush*, 185 F. Supp.2d 18 (D.D.C. 2001) and is reprinted in the Appendix. App. 11-App. 32.

JURISDICTION

The D.C. Circuit Court entered its decision on October 18, 2002. App. 1. The order of the D.C. Circuit Court denying the Petition for Rehearing *en banc* and attached Statement of the Panel was entered on February 4, 2003. App. 33.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the D.C. Circuit Court's decision by writ of *certiorari*.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Property Clause of the Constitution of the United States, Art. IV, sec. 3, cl. 2

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The Antiquities Act of 1906, 16 U.S.C. § 431

§ 2 – The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

Federal Rule of Civil Procedure 8(a)

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

* * *

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency or one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be construed as to do substantial justice.

STATEMENT OF THE CASE

On April 15, 2000, former President Clinton, purportedly acting pursuant to the Antiquities Act of 1906, 16 U.S.C. § 431, issued a Proclamation establishing a 327,769-acre Giant Sequoia National Monument on lands located within the Sequoia National Forest (the "Monument"). App. 35-App. 44. The tree-line area of the Giant Sequoia Groves themselves constitutes approximately 20,000 acres, only about 6% of the total Monument area. App. 47 (¶ 2). The Proclamation does not identify any harm currently threatening any objects contained in the Monument. Moreover, prior to President Clinton's Proclamation, several significant measures had been put into effect providing substantial protection for the Giant Sequoia Groves within the Monument area. App. 47 (¶ 3), App. 69-App. 71 (¶¶ 89-98).

On October 25, 2000, Tulare County[2] filed a nine-count complaint challenging the legal validity and current management of the Monument area on constitutional, statutory and contractual grounds. App. 45-App. 95.[3] The complaint is 55 pages long and contains more than 200 separately numbered paragraphs.

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[2] For ease of reference the coalition of twelve plaintiffs who brought the case below, all of whom participate in the filing of this petition, shall be referred to as "Tulare County."

[3] Tulare County only seeks review in this Court of the legal issues surrounding the dismissal of Counts I-V of the complaint.

Subject matter jurisdiction in the district court was founded on 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), and 28 U.S.C. § 1361 (mandamus). App. 49-App. 50 (¶ 10). Venue was proper in the district court under 28 U.S.C. § 1391(e) because a defendant in the action is an officer, employee or agency of the United States residing within the judicial district. App. 50 (¶ 11). Tulare County represents a wide cross-section of individuals, organizations, recreationists, owners of land located in and around the boundaries of the Monument, businesses and local governmental entities with a variety of interests in the management of the lands contained within the Monument. App. 50-App. 66 (¶¶ 12-77).

Counts I, II and III of the complaint allege that the 327,769-acre Monument is not "the smallest area compatible with the proper care and management of the objects to be protected" as required by the Antiquities Act and that neither the President nor his subordinates within the Executive Branch have identified or located the particular "objects of historic or scientific interest" that must be located pursuant to the terms of the Antiquities Act in order to establish the proper size of the Monument. App. 78-App. 82 (¶¶ 131-153). Count IV of the complaint alleges that the Antiquities Act authorizes national monuments for the protection of objects of historic or scientific interest, but far from protecting any purported objects within the Monument, the Proclamation actually increases the risk of harm to the Monument and its objects by increasing the risk of catastrophic fire in the Monument area and strictly limiting the construction and use of roads and trails which may be necessary for fire fighting. App. 83-App. 84 (¶¶ 154-160).

In Count V of the complaint Tulare County alleged that, in the alternative, if (as the district court found) respondents' actions may only be reviewed based on what is contained on the face of the Proclamation, then the breadth of discretion allowable under the Antiquities Act is without any meaningful limitation and the Proclamation is unconstitutional and in violation of the Property Clause and the non-delegation doctrine. App. 84-App. 85 (¶¶ 161-168).

Since the establishment of the Monument in April 2000, the lands within the Monument have been managed by the United States Forest Service through the Forest Supervisor of the Sequoia National Forest and his staff purportedly in strict conformance with the terms of the Proclamation. App. 89 (¶¶ 181-184). The Proclamation permanently bans all commercial logging not approved by December 1999 in all areas of the Monument, including the Converse Basin and other areas well outside of the Giant Sequoia Groves which have been the subject of timber harvesting since the late 1800's. App. 47-App. 48 (¶ 4), App. 73 (¶¶ 106-109). Access to the Monument area has been severely restricted by the Proclamation's permanent ban on all off-road use by motorized vehicles and the restriction of non-motorized vehicles (mountain bicycles, etc.) to specific roads and trails. App. 47-App. 48 (¶ 4), App. 74 (¶ 111). The construction and maintenance of roads and trails within the Monument area has been severely curtailed or eliminated by the terms of the Proclamation. App. 74 (¶ 111).

These restrictions on timber harvesting, access and road and trail building and maintenance have caused and continue to cause substantial harm to Tulare County. App. 50-App. 66 (¶¶ 12-77). The ban on commercial timber sales

in the Monument area outside of the Giant Sequoia Groves effectively eliminates the Sequoia National Forest as a source of timber supply for Sequoia Forest Products and has forced Sequoia Forest Products to close a mill which was dependent on that source of supply and permanently lay off all of its employees at that mill. App. 56 (¶¶ 35-36). The lack of access for motorized and non-motorized vehicles severely affects the ability of Tulare County, including access groups such as the SierraNevada Access Multiple-Use & Stewardship Coalition, App. 52-App. 54 (¶¶ 20-25), the High Desert Multiple-Use Coalition, App. 54-App. 55 (¶¶ 26-31), the Sugarloafers Snowmobile Association, App. 58-App. 59 (¶¶ 41-45), and the California-Nevada Snowmobile Association, App. 64-App. 65 (¶¶ 69-73), to use and enjoy the Monument area. The restrictions on road and trail building and maintenance likewise adversely impact the ability of all of Tulare County to use the Monument area. App. 50-App. 60, App. 66 (¶¶ 12-77).

By far the most serious harm caused by the current management of the Monument under the Proclamation is the increased risk of catastrophic fire. App. 57 (¶ 37), App. 60 (¶ 49), App. 61-App. 62 (¶ 56), App. 63-App. 66 (¶¶ 64, 68, 76), App. 76-App. 78 (¶¶ 123-130). Far from protecting the Monument area, the Giant Sequoia Groves or any objects of historic or scientific interest which might be in the Monument area outside the Groves, the ban on all commercial timber harvesting and the severe restrictions on access and the building and maintenance of roads and trails actually significantly increase the risk and potential severity of catastrophic fire. App. 78 (¶ 130). The threat of catastrophic fire is real in the Monument area as evidenced by the Manter Fire in 2000 which burned an area approximately twice the size of the District of Columbia in

the Sequoia National Forest very near the Monument. App. 77-App. 78 (¶¶ 127-129). Similarly, Tulare County requested that the Court of Appeals (and we respectfully request that this Court) take judicial notice of the McNally wildfire which occurred even more recently in July, August and September 2002 and which burned over 150,000 acres (more than three times the size of the District of Columbia) and came within a mile of one of the Giant Sequoia Groves. Catastrophic fires such as these are the result of decades of Forest Service fire prevention policy which was well-intended but which has left areas of the Sequoia National Forest and the Monument with overstocked and overgrown forests which function as virtual tinder boxes for tree stand-destroying fires that destroy all wildlife and wildlife habitat in their path and constitute serious threats to personal safety and private property. App. 57 (¶ 37), App. 74 (¶ 110), App. 76-App. 78 (¶¶ 123-130), App. 83 (¶¶ 155-160). Commercial thinning and other carefully designed forms of commercial timber harvest are necessary to prevent such fires. App. 57 (¶ 37), App. 84 (¶ 159). This increased likelihood of catastrophic fire on lands within the Monument and adjacent thereto not only threatens the personal safety and property of Tulare County, App. 50-App. 66 (¶¶ 12-77), it also threatens the wildlife and wildlife habitat that the Tulare County plaintiffs enjoy in the forest. App. 57-App. 58 (¶ 39), App. 77-App. 78 (¶¶ 124, 130).

The Forest Service has announced that a formal management plan for the Monument will be completed in the near future. App. 41-App. 42. However, whatever the content of the formal management plan, the plan cannot permit activities or uses of natural resources prohibited by the permanent terms of the Proclamation. App. 41.

On September 28, 2001 before any discovery was allowed, the district court granted the federal-defendants' motion to dismiss the complaint in its entirety. App. 11-App. 32. The district court's dismissal of Counts I-V of the complaint pursuant to Rule 12(b)(6) for failure to state a claim for which relief can be granted was based primarily on its determination that its review must be limited to the statements on the face of the Proclamation. App. 17. That is, if the President "claimed" in the Proclamation to be acting in conformity with the Antiquities Act in creating a national monument, courts are powerless to inquire any further. App. 20-App. 21. Thus, the district court took the assertions of fact in the Proclamation as irrefutably true and rejected the allegations of the complaint and any fair inferences which may be drawn from the complaint if they conflicted with the facts stated in the Proclamation. App. 17-App. 20. On October 15, 2001, Tulare County filed its timely notice of appeal of the district court's dismissal of the complaint.

On appeal, the Court of Appeals for the D.C. Circuit affirmed the district court's ruling; however, *sotto voce,* the circuit court rejected the district court's approach of limiting review to the face of the Proclamation. App. 1-App. 10. Instead, in affirming the district court, the D.C. Circuit reviewed the complaint and held that Tulare County's allegations in Counts I-IV which assert violations of the Antiquities Act were not sufficiently detailed "to trigger *ultra vires* review." App. 2, App. 5.[4]

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[4] Unlike plaintiffs in *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (App. 92-App. 109), an appeal which also challenged the creation of National Monuments which was decided by

(Continued on following page)

On November 27, 2002, Tulare County filed a Petition for Rehearing *en banc* which was denied on February 4, 2003. App. 33. Appended to the order denying the Petition for *en banc* review was a one paragraph *per curiam* Statement of the Panel asserting that the panel had complied with Rule 8(a) in affirming the dismissal of Tulare County's complaint. App. 34.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Improperly Departed From The Notice Pleading Standard Of Rule 8 And The Decisions Of This Court By Applying A Heightened Pleading Standard In Affirming The Dismissal Of Counts I-IV Of Tulare County's Complaint Challenging Presidential Compliance With The Antiquities Act

In denying Tulare County's Petition for Rehearing *en banc* the Court of Appeals stated that it had examined in Tulare County's complaint "against a no more rigorous standard of pleading than that of Rule 8(a)." App. 34. However, even a cursory review of Counts I-IV of Tulare County's complaint and the Court of Appeals' analysis of the sufficiency of the complaint demonstrates the contrary. By applying a heightened pleading standard and affirming a dismissal of Tulare County's complaint, prior to any discovery, the Court of Appeals has violated the Federal

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the same panel on the same day as Tulare County's appeal, Tulare County did not specifically plead an *ultra vires* cause of action and instead alleged that the President's actions violated the standards of the Antiquities Act.

Rules of Civil Procedure and contradicted well-established Supreme Court precedent prohibiting court-fashioned heightened pleading standards in contravention of Rule 8. *See Swierkiewicz v. Sorema N.A.*, 543 U.S. 506 (2002); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *Conley v. Gibson*, 355 U.S. 41 (1957).

Counts I-IV of the complaint contain 39 pages and 160 allegations. Counts I-III must be read together as alleging in different but related ways that the President failed to comply with a fundamental limitation expressly imposed on him by the Antiquities Act; namely, that the size of any national monument created under the Act must be "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431. Count IV alleges that far from protecting objects within the Monument as required by the Antiquities Act, the Proclamation significantly increases the threat of catastrophic fire to everything within the Monument area because the Proclamation bans any new commercial timber sales. Under this Court's longstanding interpretation of Rule 8 "a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002).

II. Counts I-III Contain Sufficient Factual Allegations Under Rule 8

The Court of Appeals construed Count I as alleging that the Act "requires the President to include a certain

level of detail in the Proclamation" regarding the identity and location of the objects to be protected by the Monument and concluded that "no such requirement exists." App. 5. Count I, however, contains no such allegation. Count I does allege that in order for the President to determine that the Monument area is the "smallest size compatible with the proper care and management of the objects," it is necessary and self-evident that he must first identify and locate the objects he intends to protect. App. 78-App. 80 (¶¶ 131-139). Otherwise, the President cannot know whether the Monument area is limited to the smallest size compatible with the protection of those objects. App. 80 (¶¶ 138-139). Count I alleges that the lyrical, generalized references in the Proclamation do not provide this information about the objects (App. 79 (¶ 136)) and that neither the President nor anyone else in the Executive Branch has elsewhere identified the necessary objects. App. 79-App. 80 (¶¶ 137-138). Although it is not necessary that the President identify and locate in the Proclamation all the objects he relies on to justify the Monument, it is obvious that he must do so somewhere. Count I alleges as a fact that this process of identification and location never took place and that therefore the President has not complied with the Act.[5]

In Count II Tulare County alleges that many of the "objects" generally referenced in the Proclamation such as

[5] Tulare County assumes that the Proclamation's general reference to the Giant Sequoia Groves must refer to the mapped Groves, but observes that this identifiable area accounts for only about 6% of the 327,769-acre Monument area and therefore it alone cannot justify the size of the Monument. App. 48 (¶ 2).

landscapes, scenic areas and ecosystems, are amorphous concepts without specific geographic locations, at least as generally referenced in the Proclamation. App. 80-App. 81 (¶¶ 141-143). However, in order for the President to determine that the Monument area is the smallest size compatible with the objects it is intended to protect, he must be able to locate and delineate those objects, and he must have done so. *Id.* Tulare County alleges that the President and his subordinates have not and cannot locate or delineate these "objects." App. 1 (¶ 2), App. 79 (¶ 137), App. 82 (¶¶ 149-151). *Cappaert v. United States*, 426 U.S. 128, 141-142 (1976), relied on by the Court of Appeals does not hold otherwise. *See* App. 6. To begin with *Cappaert* did not involve a motion to dismiss. The district court in *Cappaert* held an evidentiary hearing and issued more than 30 findings of fact. 426 U.S. at 137; *United States v. Cappaert*, 375 F. Supp. 456, 458-59 (D. Nev. 1974). Also, even though the Court in *Cappaert* rejected the argument that the Act is limited to protecting archaeological sites, the Court did not hold that objects within the meaning of the Act need not have discernable locations. Such a holding would render meaningless the size limitation expressly set forth by Congress in the Act. Tulare County's factual allegations that the landscapes, scenic areas and ecosystems generally referenced in the Proclamation have not been identified and do not have any discernable locations should be taken as true for purposes of the motion to dismiss. The court of appeals erred in affirming the dismissal of Count II.

The allegations in Count III are at the core of Tulare County's complaint. Paragraph 150 alleges that contrary to the Act, the 327,769-acre Giant Sequoia National Monument is not "the smallest area compatible with the

proper care and management of the objects to be protected." App. 82. Paragraphs 149 and 151 allege that neither prior to issuing the Proclamation nor to date has the President or any other defendant actually determined or even investigated the minimum area required for this Monument. App. 82. These allegations are not, as the Court of Appeals asserts, legal conclusions couched as factual allegations. App. 6. Moreover, Count III incorporates the preceding 145 paragraphs of the complaint, including Counts I and II and paragraph 2 which alleges in part: "Thus, based only on vague and generalized references, the Proclamation purports to establish a vast 327,769-acre monument, constituting one-third of the total area of the Sequoia National Forest. App. 47 (¶ 2). In contrast, the total tree line area of the Giant Sequoia Groves on the Sequoia National Forest is at most less than 6% of the entire Monument area." *Id.* This is a factual allegation from which it may reasonably be inferred that at least 94% of the monument area is not necessary to protect the only objects that can be identified and located from the Proclamation, *i.e.*, the mapped Giant Sequoia Groves. If all reasonable inferences are drawn in favor of Tulare County, as is required by FED. R. CIV. P. 12(b)(6), and the complaint is construed so "as to do substantial justice" (Rule 8(f)), this case should not be dismissed until at least this factual allegation has been successfully rebutted by the defendants.

In the Statement of the Panel accompanying the court of appeals' denial of Tulare County's Petition for Rehearing *en banc*, the panel reiterated that it affirmed the district court's dismissal of Count III "because [Count III] contains no factual allegations that any part of the Monument lacks scientific or historic value." App. 34. However, under the liberal notice pleading standards of Rule 8(a) it is reasonable to infer from the complaint, and in particular Count III, that Tulare County alleges that there are no identified objects of scientific or historic value in the 94% of the Monument area outside of the Giant Sequoia Groves. Indeed, the Court of Appeals concedes that the "allegation that the Sequoia Groves comprise only 6% of the Monument may well have been sufficient [to avoid dismissal of the complaint] if the President had identified only Sequoia Groves for protection, but he did not; the Proclamation covered natural resources present *throughout the Monument area*." App. 34 (emphasis added). But whether the objects needed to justify the remaining 94% of the Monument area were identified and located "throughout the Monument area" is the central question raised by Tulare County's complaint. Tulare County contends that the President and his subordinates have not identified or located any such objects and that 94% of the Monument area is therefore not justified under the terms of the Antiquities Act. App. 47 (¶ 2), App. 79 (¶ 137), App. 82 (¶¶ 149-151). The notice pleading standard of Rule 8 and the direction of Rule 8(f) that the complaint be construed so "as to do substantial justice" preclude dismissal of the complaint under Rule 12(b)(6) at the pleading stage of this case.

Under the court of appeals' interpretation of Rule 8(a) Tulare County or any other plaintiff challenging a President's compliance with the Antiquities Act in creating a

national monument must guess correctly from the lyrical prose of a President's Proclamation the particular objects which he intends the Monument to protect and then specifically identify in the complaint each geographic area within the Monument which is unnecessary for the "proper care and management" of those objects. Requiring such a showing at the pleading stage is directly contrary to the concept of notice pleading under Rule 8 and is especially inappropriate in a case such as this where virtually all of the information bearing on the identity and location of any objects to be protected by the Monument is in the exclusive custody and control of the defendant.[6] The standard of review imposed by the court of appeals requires considerably more than the "short and plain statement" prescribed by Rule 8(a).

III. Count IV Addresses The Permanent Restrictions Imposed By The Proclamation And Contains Factual Allegations Sufficient Under Rule 8

The Court of Appeals ruled that Count IV fails because it "contains no factual allegations, only conclusions," and "it refers to current management rather than the designation under the Proclamation as the cause for likely

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[6] As one scholar recently observed:

> The pleading stage is not the best place to perform the necessary tasks of factual development and winnowing of issues; these necessities are best left to be performed by other procedural devices.

Christopher M. Fairman, *Heightened Pleading*, 81 Texas L. Rev. 551, 591-592 (2002).

increases in catastrophic fires. Complaint ¶ 159." App. 8. Neither of these statements is correct. Count IV alleges that rather than increase protection for the Monument area, the terms of the Proclamation actually significantly increase the likelihood of catastrophic fire within the Monument. App. 83-App. 84 (¶¶ 154-160). Paragraph 156 of the complaint alleges, as a fact, that "there is presently a severe risk of catastrophic wildfire within the Monument area." App. 83. Paragraphs 157-158 allege that such a fire "can spread rapidly over thousands of acres destroying all plant and animal life in its path" as the Cerro Grande fire did recently in a national monument in Los Alamos, New Mexico. App. 83. Other earlier paragraphs in the complaint which are incorporated by reference in Count IV contain more factual allegations. For example, ¶¶ 123-130 allege that the Forest Service has maps and studies which demonstrate that substantial portions of the monument area contain land that is in the "Forest Service's highest risk category for wildfire." App. 76-App. 78. Paragraphs 126-130 allege that in July 2000 the Manter wildfire raged across the Sequoia National Forest and came close to the Monument area. App. 77-App. 78.[7] Accordingly, the complaint alleges that byprohibiting commercial timber sales in the Monument area:

> The Proclamation and the current management of the Monument area increase the risk that a fire like the Manter fire could start in the Monument area and spread rapidly with destructive force to

[7] Even more recently in July, August and September 2002, the McNally wildfire burned over 150,000 acres (more than three times the size of the District of Columbia) and came within a mile of one of the Giant Sequoia Groves.

> destroy the Giant Sequoia Groves and other plants and animals in and around the Monument area. Such a fire would also threaten the safety and well-being of individuals and their property within and near the Monument area.

App. 78 (¶ 130). Similar factual allegations are made in the other paragraphs of Count IV. For example,

> By forbidding commercial timber harvest, unduly restricting the removal of trees and strictly limiting the construction and use of roads and trails which may be necessary for fire fighting, among other restrictions, the Proclamation and the current management of the Monument increase the likelihood that catastrophic fire will start and spread disastrously within the Monument area and to lands outside the Monument.

App. 84 (¶ 159). The allegations of Count IV are directed to the permanent terms of the Proclamation as well as to the current management of the Monument under those terms. These are genuine factual allegations, not legal conclusions couched as factual allegations, and these factual allegations are of sufficient particularity to satisfy the notice pleading requirements of Rule 8.

IV. The Court of Appeals' Decision On An Important Federal Question Conflicts With Supreme Court Precedent

As recently as February 2002, the Supreme Court addressed the level of factual specificity required to meet the standard for notice pleading established by Rule 8. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). *Swierkiewicz* involved the dismissal of a complaint in an employment discrimination action for failure to allege

sufficient facts to establish a *prima facia* case. *Id.* at 509. The Court reversed the dismissal and reaffirmed that the notice pleading standard of Rule 8 means that "a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* at 513. In overruling the imposition of a heightened pleading standard the unanimous Court stated:

> Rule 8(a)'s simplified pleading standard applies to all civil actions with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. *This Court, however, has declined to extend such exceptions to other contexts.*

Id. at 513 (emphasis added). Accordingly, the notice pleading standard of Rule 8 governs all but the few specific situations set forth in FED. R. CIV. P. 9, and courts are not free to impose heightened pleading standards in contexts beyond those provided for in Rule 9.

Although the court of appeals in the instant case denied that it applied a heightened pleading standard, the court clearly imposed a standard beyond the requirements of Rule 8 and disregarded the direction of Rule 8(f) "to do substantial justice" when it ruled that Tulare County's complaint was not sufficiently detailed "to trigger *ultra vires* review." *Tulare County* at 1140. In *Crawford-El v. Britton*, 523 U.S. 574, 583 (1998), this Court vacated the D.C. Circuit's *en banc* determination that heightened standards of proof apply at the summary judgment stage in cases alleging civil rights claims against government officials. *See also Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) ("In light of *Crawford-El*, nearly all of the circuits have now disapproved of any

heightened pleading standard in cases other than those governed by Rule 9(b)" (citations omitted)).

The ruling in *Swierkiewicz* relied heavily on the Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), in which the Court reviewed the Fifth Circuit's requirement that "complaints state with factual detail and particularity the basis for the claim" in civil rights cases alleging liability for a municipality based on the actions of its police officers. *Id.* at 167. In reversing the adoption of a heightened pleading standard, Chief Justice Rehnquist, writing for a unanimous Court, reiterated that since *Conley v. Gibson*, the only requirement under Rule 8, is a short and plain statement that will give the defendant fair notice of the plaintiffs' claim and the grounds upon which it rests. *Id.* at 168. The Court further observed:

> Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*

Id. at 168. The Court acknowledged that if Rules 8 and 9 were rewritten today it might include the heightened pleading requirement imposed by the Fifth Circuit, but again admonished lower courts:

> But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

Id. 168-169.[7] The Court of Appeals failed to heed this direction when it affirmed the dismissal of Tulare County's complaint based on heightened pleading standards that are neither permitted under Rule 8 nor required by Rule 9.

The assertion by the court of appeals panel that it "examined the complaint against a no more rigorous standard of pleading than that of Rule 8(a)" (App. 34) simply cannot be squared with the plain factual allegations of the complaint and the direction in Rule 8(f) that the complaint be construed "to do substantial justice." In addition, the court of appeals' decision in the instant case cannot be squared with the D.C. Circuit's decisions in *Browning v. Clinton*, 292 F.3d 235, 243 (D.C. Cir. 2002) (reversing dismissal of complaint alleging tortious conduct by sitting President and aides and finding that complaint met the requirements of Rule 8 although allegations were often "thin," "extremely general," or supported only by assertions of counsel "upon information and belief"), and *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1118 (D.C. Cir. 2000) ("We understand why district courts may want to alleviate the crowded dockets by disposing quickly of cases they believe cannot survive in the long run. But as the Supreme Court held in *Leatherman*, this may not be

[7] The significance of *Leatherman*'s rejection of heightened pleading standards was acknowledged by Judge Edwards of the D.C. Circuit even before the Supreme Court's recent revisiting of the issue in *Swierkiewicz*. *See, e.g.*, *Kimberlin v. Quinlan*, 17 F.3d 1525, 1528 (D.C. Cir. 1994), *judgment vacated*, 515 U.S. 321 (1995) (Edwards, J. dissenting from decision to deny rehearing *en banc*: "*Leatherman*'s emphatic language seems to admit of only one reading: heightened pleading standards other than those set forth in Rule 9(b) are simply *impossible to square* with the Federal Rules of Civil Procedure, and are therefore invalid" (emphasis in original)).

accomplished by employing heightened pleading standards except in those cases specifically listed in Rule 9(b)"). The court of appeals' denial that it applied a heightened pleading standard in this case is not credible. This Court should not allow the lower courts to contravene the clear direction in *Swierkiewicz*, *Leatherman* and *Conley*, whether the lower courts do so expressly or implicitly.

V. Count V Of The Complaint States A Constitutional Claim

The Court of Appeals ruled that there was no constitutional claim before it because the Act contains "intelligible principles" and the President exercised his delegated powers under the Act. App. 8. However, under the heightened pleading standard applied by the court of appeals and its mischaracterization of many of Tulare County's allegations as legal allegations couched as factual allegations, the President's actions are in no way restrained by the intelligible principles set forth in the Act because they are not subject to any meaningful judicial review. In the absence of any language in the Act or elsewhere that Congress intended to prohibit judicial review of Presidential compliance with the Act, such review is constitutionally required, and without it the delegation by Congress of its powers under the Property Clause violates the Constitution. U.S. Const., Art. IV, sec. 3, cl. 2.

VI. In The Ninety-Six Years Since The Passage Of The Antiquities Act No Other Cases Under The Act Have Been Resolved By A Motion To Dismiss

In the ninety-six years since the passage of the Act, only the court of appeals in this case and the district court below have disposed of cases alleging a violation of the Act on a motion to dismiss. *See, e.g., United States v. California,* 436 U.S. 32, 36-37 (1978) (finding it "unnecessary" to address President's intent in proclaiming National Monument because lands constituting Monument had been transferred by subsequent legislation to State of California); *Cappaert v. United States*, 426 U.S. 128, 136, 143 (1976) (district court conducted hearing made detailed findings of fact and enjoined plaintiffs' pumping of water from pool in National Monument. Court upheld injunction only to extent facts demonstrated that water level was required to implement Monument objectives); *Cameron v. United States*, 252 U.S. 450, 456-458 (1920) (Cameron's claim to valid mining rights within National Monument only resolved after hearing and opportunity to present evidence); *Anaconda Copper Co. v. Andrus*, 14 E.R.C. 1853 (D. Alaska 1980) (District court denied cross-motions for partial summary judgment, found that there were limitations on presidential power under the Act and reserved making final determination on factual issues); *State of Alaska v. Carter*, 462 F. Supp. 1155, 1159 (D. Alaska 1978) (denied temporary restraining order and preliminary injunction, holding that NEPA does not apply to President's decisions under Act); *State of Wyoming v. Franke*, 58 F. Supp. 890, 892-96 (D. Wyo. 1945) (Government's pretrial motion to dismiss and for summary judgment denied, trial conducted on factual issue of whether National

Monument contained objects of historic or scientific interest).[8]

In addition, a case has been pending in the Utah District Court since 1997, challenging former President Clinton's creation of the Grand Staircase Escalante National Monument. The Utah District Court has allowed the parties to engage in discovery despite the pendency of motions to dismiss. *See Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001). Thus, the heightened pleading standard imposed by the D.C. Circuit and the dismissal of Tulare County's complaint at the pleading stage stand as dramatic departures from nearly 100 years of adjudication under the Act. Accordingly, the Circuit Court's opinion has so far departed from the accepted and

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[8] A dismissal in *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (App. 97-App. 109), was affirmed by the Court of Appeals on the same day as the instant case was decided. *Mountain States* challenged the validity of Presidential proclamations designating several national monuments on constitutional and *ultra vires* grounds. In its complaint *Mountain States* alleged merely that "the six Proclamations at issue exceed the President's authority under the property clause and are therefore unconstitutional and *ultra vires*. App. 99." The government responded to the complaint by asserting in its motion to dismiss that the President exercised his delegated powers under the Antiquities Act. In response to the government's motion, *Mountain States* argued that the President failed to comply in various respects with requirements of the Act. Unlike Tulare County's complaint, the *Mountain States* complaint did not allege directly that the size of the monuments exceeded the limitations of the Antiquities Act, that the President had failed to identify or locate the objects required to justify the size of the monuments or that the permanent terms of a proclamation actually threatened harm to a monument rather than afforded it protection.

usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONCLUSION

For each of the foregoing reasons, Tulare County respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: May 5, 2003

306 F.3d 1138

United States Court of Appeals,
District of Columbia Circuit.

TULARE COUNTY, et al., Appellants,
v.
George W. BUSH, in his official capacity as President of the United States of America, et al., Appellees.
Natural Resources Defense Council, et al., Intervenors.

No. 01-5370.

Argued Sept. 5, 2002.
Decided Oct. 18, 2002.

Appeal from the United States District Court for the District of Columbia (No. 00cv02560).

Gary G. Stevens argued the cause and filed the briefs for appellants.

Susan Pacholski, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were Ellen J. Durkee, Michael Gheleta and Ann Navaro, Attorneys, U.S. Department of Justice.

Andrew E. Wetzler argued the cause for intervenors Natural Resources Defense Council, et al. With him on the brief were Nathaniel S.W. Lawrence, Michael R. Sherwood, Anne Harper and James S. Pew.

Raissa S. Lerner, Deputy Attorney General, Attorney General's Office of the State of California, argued the cause for intervenor People of the State of California. With her on the brief were Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General and Theodora Berger, Senior Assistant Attorney General.

Before: EDWARDS and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

This is the second case we decide today involving a challenge to Presidential authority under the Antiquities Act of 1906 ("Act"), 16 U.S.C. § 431 (2000). In *Mountain States v. Bush,* 306 F.3d 1132 (D.C.Cir.2002), the court, upon *de novo* review, affirmed the dismissal of the complaint, holding that the complaint, which challenged a series of monument designations under the Act, contained insufficient factual allegations under Federal Rule of Civil Procedure 8(a) to trigger *ultra vires* review of the President's Proclamations. *Id.* at 8-10. The court also held that the complaint failed as a matter of law insofar as it alleged that the Proclamations violated the plain terms of the Antiquities Act and other federal statutes. *Id.* at 8, 10-11. We likewise hold, upon *de novo* review, that the complaint in the instant case fails for the same reasons. Accordingly, we affirm the dismissal of the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I.

In April 2000 President Clinton established by proclamation the Giant Sequoia National Monument pursuant to his authority under the Antiquities Act. Proclamation 7295, 65 Fed. Reg. 24,095 (Apr. 15, 2000). The Monument, which encompasses 327,769 acres of land in the Sequoia National Forest in south-central California,

contains groves of giant sequoias, the world's largest trees, and their surrounding ecosystem. *Id.* at 24,095-97, 24,100.

Tulare County, which contains land near and within the Grand Sequoia National Monument ("Monument"), along with a number of other public and private entities that use the Monument area for business or recreational purposes (hereinafter "Tulare County"), filed a complaint seeking declaratory and injunctive relief. Tulare County alleged that the Proclamation violated various provisions of the Antiquities Act and the Property Clause of the Constitution, as well as the National Forest Management Act, the National Environmental Policy Act, and the parties' existing rights under a prior mediated settlement agreement. The district court, concluding that only facial review was appropriate, dismissed the complaint. *Tulare County v. Bush,* 185 F.Supp.2d 18 (D.D.C.2001).

II.

On appeal, Tulare County contends that in dismissing its complaint prior to discovery, the district court erred in failing to accept as true the facts alleged in the complaint and in limiting its review to the face of the Proclamation rather than reviewing the President's discretionary factual determinations. Tulare County does not contend that the President lacks authority under the Antiquities Act to proclaim national monuments like Giant Sequoia, as the Supreme Court has long upheld such authority. *Cappaert v. United States,* 426 U.S. 128, 142, 96 S.Ct. 2062, 2071, 48 L.Ed.2d 523 (1976); *Cameron v. United States,* 252 U.S. 450, 455, 40 S.Ct. 410, 410-11, 64 L.Ed. 659 (1920). Rather, in Counts 1-4 of the complaint, Tulare

County alleged that the Proclamation violated the Antiquities Act because it: (1) failed to identify the objects of historic or scientific interest with reasonable specificity; (2) designated as the basis for the Monument objects that do not qualify under the Act; (3) did not confine the size of the Monument "to the smallest area compatible with proper care and management of the objects to be protected," 16 U.S.C. § 431; and (4) increased the likelihood of harm by fires to any objects of alleged historic or scientific interest within the Monument rather than protecting those objects. In Count 5, Tulare County argued that, absent judicial review of the President's action under the Antiquities Act, the statute constitutes an unconstitutional delegation of congressional authority. The remaining counts alleged that other federal statutes barred the Proclamation and that the Proclamation violated extant legal rights arising from a mediated settlement agreement with the National Forest Service prior to the Proclamation.

The Antiquities Act provides, in relevant part, that the President, "in his discretion" may declare "historic landmarks . . . and other objects of historic or scientific interest . . . situated upon [federal] lands . . . to be national monuments, and may reserve . . . parcels of land . . . confined to the smallest area compatible with the proper care and management of the objects to be protected. . . . " 16 U.S.C. § 431. The court pointed out in *Mountain States,* after reviewing Supreme Court authority discussing the scope of judicial review of discretionary Presidential decisionmaking, that the court "is necessarily sensitive to pleading requirements where, as here, it is asked to review the President's actions under a statute that confers very broad discretion on the President and separation of

powers concerns are presented." *Mountain States,* 306 F.3d at 1137. Acknowledging that Congress has entrusted the courts with responsibility for determining the limits of statutory grants of authority, *id.* at 8, the court nonetheless declined to engage in *ultra vires* review in light of the absence of allegations or arguments in the record to indicate any infirmity in the challenged Proclamations. *Id.* at 9. Consequently, we review Tulare County's complaint to determine whether it contains factual allegations to support an *ultra vires* claim that would demonstrate the district court erred in declining to engage in a factual inquiry to ensure that the President complied with the statutory requirements.

Count 1 of Tulare County's complaint is premised on the assumption that the Antiquities Act requires the President to include a certain level of detail in the Proclamation. No such requirement exists. The Act authorizes the President, "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." 16 U.S.C. § 431. The Presidential declaration at issue complies with that standard. The Proclamation lyrically describes "magnificent groves of towering giant sequoias," "bold granitic domes, spires, and plunging gorges," "an enormous number of habitats," "limestone caverns and . . . unique paleontological resources documenting tens of thousands of years of ecosystem change," as well as "many archaeological sites recording Native American occupation . . . and historic remnants of early Euroamerican settlement." Proclamation at 24,095. By identifying historic sites and objects of scientific interest located within the designated lands, the Proclamation adverts to the statutory standard. Hence, Count 1 fails as a matter of law.

Count 2 alleges that the President has designated nonqualifying objects for protection. The Antiquities Act provides that, in addition to historic landmarks and structures, "other objects of historic or scientific interest" may qualify, at the President's discretion, for protection as monuments. 16 U.S.C. § 431. Inclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on non-qualifying features. In *Cappaert,* 426 U.S. at 141-42, 96 S.Ct. at 2070-71, the Supreme Court rejected a similar argument, holding that the President's Antiquities Act authority is not limited to protecting only archeological sites.

As relevant to Count 3 of the complaint, the Proclamation states that the Monument's 327,769-acre size "is the smallest area compatible with the proper care and management of the objects to be protected." Proclamation at 24,097. It also states that the sequoia groves are not contiguous but instead comprise part of a spectrum of interconnected ecosystems. *Id.* Tulare County alleges that no one in the Clinton Administration "made any meaningful investigation or determination of the smallest area necessary to protect any specifically identified objects of genuine historic or scientific interest." Compl. ¶ 149. Instead, it alleges, President Clinton "bowed to political pressure . . . in designating a grossly oversized Monument unnecessary for the protection of any objects of genuine historic or scientific interest." Compl. ¶ 150. This allegation is a legal conclusion couched as a factual allegation. "Although in reviewing the dismissal of a complaint the court must take 'all factual allegations in the complaint as true,' the court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Mountain*

States, 306 F.3d at 1137 (quoting *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 2944, 92 L.Ed.2d 209 (1986)).

Contrary to the assumption underlying Count 3, the Antiquities Act does not impose upon the President an obligation to make any particular investigation. And to the extent that Tulare County alleges that the Proclamation designates land that should not be included within the Monument, the complaint fails to identify the improperly designated lands with sufficient particularity to state a claim. *Id.* Insofar as Tulare County alleges that the Monument includes too much land, i.e., that the President abused his discretion by designating more land than is necessary to protect the specific objects of interest, Tulare County does not make the factual allegations sufficient to support its claims. This is particularly so as its claim that the Proclamation covered too much land is dependent on the proposition that parts of the Monument lack scientific or historical value, an issue on which Tulare County made no factual allegations. *Cf. Dalton v. Specter,* 511 U.S. 462, 473-74, 114 S.Ct. 1719, 1726-27, 128 L.Ed.2d 497 (1994); *United States v. George S. Bush & Co.,* 310 U.S. 371, 379, 60 S.Ct. 944, 946, 84 L.Ed. 1259 (1940).

Count 4 of the complaint alleges that the Monument designation actually increases the risk of harm from fires to many of the objects that the Proclamation aims to protect. However, the Proclamation expressly addresses the threat of wildfires and the need for forest restoration and protection. The Proclamation observes that forest renewal is needed because environmental change "has led to an unprecedented failure in sequoia reproduction," and that "a century of fire suppression and logging" has created "an increased hazard of wildfires of a severity that

was rarely encountered in pre-Euroamerican times." Proclamation at 24,095. Count 4 contains no factual allegations, only conclusions, *see, e.g.,* Compl. ¶ 160, and it refers to current management rather than the designation under the Proclamation as the cause for likely increases in catastrophic fires, Compl. ¶ 159.

Count 5, alleging that if judicial review is not available under the Antiquities Act then the Act violates the Property Clause of the Constitution as an improper delegation of congressional authority to the President, fares no better. As the court held in *Mountain States,* "[n]o Constitutional Property Clause claim is before us, as the President exercised his delegated powers under the Antiquities Act, and that statute includes intelligible principles to guide the President's action." 306 F.3d at 1136-37 (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474, 121 S.Ct. 903, 913, 149 L.Ed.2d 1 (2000); *Dalton,* 511 U.S. at 473-74 & n. 6, 114 S.Ct. at 1726-27 & n. 6).

Tulare County's remaining contentions, involving other federal statutes and contractual rights, fail as a matter of law. Contrary to Count 6 of the complaint, the Proclamation does not violate the National Forest Management Act of 1976 ("NFMA"), Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) (2000), by unlawfully withdrawing land from the national forest system. The NFMA provides that no national forest land "shall be returned to the public domain except by an act of Congress." 16 U.S.C. § 1609(a). The Proclamation states that "[a]ll federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale, leasing, or other disposition under the public land laws. . . . " Proclamation at 24,097. The

Proclamation also states that "[n]othing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation." *Id.* at 24,098. The Proclamation thus conceives of the designated land as having a dual status as part of both the Monument and the Sequoia National Forest. *Cameron,* 252 U.S. at 455, 40 S.Ct. at 410-11; *Tulare County,* 185 F.Supp.2d at 27. *Compare United States v. California,* 436 U.S. 32, 40, 98 S.Ct. 1662, 1666, 56 L.Ed.2d 94 (1978). The Proclamation is therefore wholly consistent with NFMA.

Tulare County alleges alternatively, in Counts 7 and 8, that if the Proclamation did not remove land from the national forest system, then the current management of the Monument by the National Forest Service violates the NFMA and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332 (2000). Neither NFMA nor NEPA provides a cause of action, so the claims must be brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2000). Because Presidential actions, of course, are not subject to APA review, *Franklin v. Massachusetts,* 505 U.S. 788, 800-01, 112 S.Ct. 2767, 2775-76, 120 L.Ed.2d 636 (1992), Tulare County attempts to overcome this bar by challenging the non-presidential actions of the Forest Service, referring to two Forest Service documents – an internal Forest Service memorandum interpreting the Proclamation and an interim plan that directs the day-to-day management of the Monument – allegedly showing that the Service is not acting consistently with the Proclamation. Although Tulare County refers to the existence of foresters on the ground, the complaint does not identify these foresters' acts with sufficient specificity to state a claim.

Finally, regarding Count 9, the Proclamation explicitly states that "the establishment of the monument is subject to valid existing rights." Proclamation at 24,097. Tulare County alleges that the Proclamation violates existing rights that were established by the Mediated Settlement Agreement in 1990, which provided that commercial logging would continue to be available in the Converse Basin area of the Monument. Tulare County ignores the fact that the settlement agreement did not create in any of the parties a right to actual timber harvest, *cf. Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 733, 118 S.Ct. 1665, 1670, 140 L.Ed.2d 921 (1998), and it failed to allege that any of the appellants possesses a contract for timber harvest. The allegation that the Proclamation violates the Sequoia National Forest Trail Plan likewise fails for lack of sufficient particularity.

Accordingly, because "[a]t no point has [Tulare County] presented factual allegations that would occasion . . . *ultra vires* review of the Proclamation[ ]" *Mountain States,* 306 F.3d at 1136-37, we affirm the dismissal of the complaint.

185 F.Supp.2d 18

United States District Court,
District of Columbia.

TULARE COUNTY et al., Plaintiffs,
v.
George W. **BUSH** et al., Defendants.

No. Civ.A.00-2560(RMU).

Sept. 28, 2001.

Gary Griffin Stevens, Saltman & Stevens, P.C., Washington, DC, for Plaintiffs.

Martin Lalonde, Ann D. Navaro, U.S. Department of Justice Environment & Natural Resources Division, Washington, DC, Michael A. Gheleta, U.S. Department of Justice Environment & Natural Resources Division, Denver, CO, for Defendants.

Michael Sherwood, Earthjustice, Oakdale, CA, Jeremy Todd Hutchins, Earth Justice Washington, DC, for Environmental Movants.

Raissa S. Lerner, California Attorney General's Office, Oakland, CA, for Movant State of California.

MEMORANDUM OPINION

URBINA, District Judge.

GRANTING THE DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

On April 15, 2000, pursuant to the Antiquities Act of 1906, President Clinton issued a proclamation

establishing the Giant Sequoia National Monument ("the Monument"). Proclamation Number 7295 ("the Proclamation") declared that the Monument would encompass 327,769 acres of land in the Sequoia National Forest in southern central California. According to the Antiquities Act, the President may, "in his discretion," designate federal land as a national Monument when it includes "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." *See* 16 U.S.C. § 431.

The plaintiffs in this action are various individuals and groups that have interests in the use of the Sequoia National Forest land within the boundaries of the Monument. The plaintiffs filed this action against the defendants, President Clinton and various other entities of the United States government, seeking declaratory relief. The plaintiffs allege that the Proclamation and the Forest Service's current implementation of the Proclamation violate the Antiquities Act, the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, the plaintiffs' rights, and the Property Clause of the Constitution, U.S. CONST. art. IV, § 3, cl. 2. This matter is before the court on the defendants' motion to dismiss for lack of subject-matter jurisdiction or, alternatively, for failure to state a claim on which relief can be granted. For the reasons that follow, the court will grant the defendants' motion to dismiss.

II. BACKGROUND

On April 15, 2000, President Clinton issued a proclamation establishing the Giant Sequoia National Monument pursuant to the Antiquities Act of 1906. *See* 16 U.S.C. § 431; 65 Fed.Reg. 24095 (2000). The Proclamation states that the Monument encompasses "the smallest area compatible with the proper care and management of the objects to be protected," 327,769 acres of land located within the Sequoia National Forest in southern central California. *See* 65 Fed.Reg. at 24097. The Proclamation reserves this land for the purpose of protecting a variety of objects of historic and scientific interest such as: "rich and varied landscape," "magnificent groves of towering giant sequoias," "gigantic domes," and "archeological sites recording Native American occupation and adaptations." *See* 65 Fed.Reg. at 24095-24097. According to the Proclamation, "the monument is rich in rare plants and is home to more than 200 plant species endemic to the southern Sierra Nevada mountain range. . . . " *See id.*

Regarding the use of land included in the Monument, the Proclamation provides for "continued public and recreational access and use consistent with the purposes of the monument." *See id.* at 24097. The Proclamation states that "[t]he establishment of this monument is subject to valid existing rights." *See id.* at 24097. The Proclamation also provides for the continuing existence of timber sales under contract on the date of the Proclamation and states that the Proclamation will not affect existing special use authorizations. *See id.* at 24097-98. As to the management of the Monument, the Forest Service shall manage the Monument, "pursuant to applicable legal authorities, to implement the purposes and provisions of this proclamation." *Id.* at 24097. Finally, the Proclamation gives the

Secretary of Agriculture three years from the date of the Proclamation to develop an official management plan for the Monument. *See id.*

Tulare County, one of the plaintiffs, is a county in the State of California that holds land near and within the Monument. *See* Compl. ¶ 12. Other plaintiffs include Sierra Forest Products, High Desert Multiple-Use Coalition, Kent Duysen, Sierra Nevada Access Multiple-Use & Stewardship Coalition, Sugarloafers Snowmobile Association, Montecito-Sequoia Camp, and Navelencia Resource Conservation District. *See* Compl. ¶¶ 12-77. Generally speaking, the plaintiffs use the Monument area for business and recreational purposes. *See id.*

Two of the plaintiffs, Sierra Forest Products and High Desert Multiple-Use Coalition were involved in an administrative appeal of the Land and Resource Plan, the Forest Service's management plan for the Sequoia National Forest. *See* Compl. ¶¶ 87-89; Pls.' Opp'n at 39. The Forest Service adopted this Land and Resource Plan in 1988 to preserve old-growth Giant Sequoias. *See* Compl. ¶ 87. In 1990, these plaintiffs, other appellants of the management plan, and the Forest Service entered into a Mediated Settlement Agreement ("MSA") with the Forest Service. *See* Compl. ¶ 89.

On October 25, 2000, the plaintiffs, seeking declaratory relief, filed a complaint, alleging nine claims: (1) the Proclamation violates the Antiquities Act because the alleged objects of historic and scientific interest have not been identified with reasonable specificity; (2) the Proclamation violates the Antiquities Act because it designates non-qualifying objects as the basis for the Monument; (3) the Proclamation violates the Antiquities Act because the

size of the Monument is not confined to the smallest area compatible; (4) the Proclamation violates the Antiquities Act because it increases the likelihood of harm to any objects of alleged historic and scientific interest within the Monument; (5) the Proclamation violates the Property Clause of the Constitution; (6) the Proclamation violates the NFMA by withdrawing land from the National Forest System; (7) the current management by the Forest Service of the Monument is in violation of the NFMA and its forest planning regulations; (8) the current management of the Monument is in violation of the NEPA; and (9) the Proclamation violates valid existing rights, including those contained in the Mediated Settlement Agreement. *See* Compl. ¶¶ 131-204.

The plaintiffs allege that the Monument is physically over-inclusive. *See* Pls.' Opp'n at 1. According to the plaintiffs, the "Giant Sequoia groves constitute only about 20,000 acres or 6% of Monument area." *See id.* Also, the plaintiffs charge that the Forest Service's current management of the Monument area significantly decreases timber sales, recreational uses, and rights of access to the Monument. *See* Compl. ¶¶ 108-14.

On March 23, 2001, the defendants filed a motion to dismiss under both Federal Rule of Civil Procedure 12(b)(1), lack of jurisdiction, and Rule 12(b)(6), failure to state a claim on which relief could be granted. *See* Defs.' Mot. to Dismiss ("Mot. to Dismiss") at 1.

III. ANALYSIS

A. Legal Standard for Motion to Dismiss

In reviewing a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *See, e.g., Pitney Bowes v. United States Postal Serv.,* 27 F.Supp.2d 15, 19 (D.D.C.1998) (Urbina, J.). On a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *See District of Columbia Retirement Bd. v. United States,* 657 F.Supp. 428, 431 (D.D.C.1987). In evaluating whether subject-matter jurisdiction exists, the court must accept all uncontroverted, well-pleaded facts as true and attribute all reasonable inferences to the plaintiffs. *See Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overturned on other grounds by Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The Court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations. *See, e.g., Lawrence v. Dunbar,* 919 F.2d 1525, 1529 (11th Cir.1990).

Moreover, the court need not limit itself to the allegations of the complaint. *See Hohri v. United States,* 782 F.2d 227, 241 (D.C.Cir.1986), *vacated on other grounds by* 482 U.S. 64, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987). Rather, the court may consider such materials outside the pleadings as it deems appropriate to determine whether it has jurisdiction in the case. *See Herbert v. National Academy of Sciences,* 974 F.2d 192, 197 (D.C.Cir.1992).

For a complaint to survive a Rule 12(b)(6) motion to dismiss, it need only provide a short and plain statement

of the claim and the grounds on which it rests. *See* Fed.R.Civ.P. 8(a)(2); *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). A motion to dismiss under Rule 12(b)(6) tests not whether the plaintiff will prevail on the merits, but instead whether the plaintiff has properly stated a claim. *See* Fed.R.Civ.P. 12(b)(6); *Scheuer,* 416 U.S. at 236, 94 S.Ct. 1683. The plaintiff need not plead the elements of a prima-facie case in the complaint. *See Sparrow v. United Air Lines, Inc.,* 216 F.3d 1111, 1114 (D.C.Cir.2000). Thus, the court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Atchinson v. District of Columbia,* 73 F.3d 418, 422 (D.C.Cir.1996). Moreover, the court should draw all reasonable inferences in the nonmovant's favor. *See Judicial Watch, Inc. v. Clinton,* 880 F.Supp. 1, 7 (D.D.C.1995).

B. The Court Dismisses Counts One Through Four Because the Proclamation Does Not Violate the Antiquities Act

In Counts One through Four, the plaintiffs allege that the Proclamation violates the Antiquities Act in various ways. *See* Compl. ¶¶ 131-60. Reviewing the Proclamation on its face, this court determines that there is no set of facts on which the plaintiffs could demonstrate that the Proclamation violates the Antiquities Act. Consequently, the court dismisses Counts One through Four pursuant to Rule 12(b)(6).

1. The Antiquities Act

The Antiquities Act authorizes the President of the United States:

> in his discretion, to declare by public proclamation historic landmarks . . . and other objects of historic and scientific interest that are situated upon lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

16 U.S.C. § 431. The Antiquities Act sets forth no means for reviewing a President's proclamation other than specifying that a President has discretion in his or her use of the Act. *See id.*

Presidents have used the Antiquities Act to declare national monuments more than 120 times and in at least 27 states. *See Esplin v. Clinton,* No. 00-0148 at 6 (D.Ariz. Nov. 20, 2000) (Defs.' Ex. 2) ("Esplin").[1] Denying parties' claims that the use of the Antiquities Act should be limited, the Supreme Court has explained that "[t]he act

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[1] The use of the Antiquities Act has been challenged six times and courts have upheld the use of the Antiquities Act each time. *See Esplin* at 6 and n. 1; see, e.g., *United States v. California,* 436 U.S. 32, 98 S.Ct. 1662, 56 L.Ed.2d 94 (1978); *Cameron v. United States,* 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659 (1920); *Wyoming v. Franke,* 58 F.Supp. 890 (D.Wyo.1945); *Cappaert v. United States,* 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Anaconda Copper Co. v. Andrus,* 14 ERC 1853 (D.Alaska 1980) (Defs.' Ex. 3); *Alaska v. Carter,* 462 F.Supp. 1155 (D.Alaska 1978).

under which the President proceeded empowered him to establish reserves embracing 'objects of historic or scientific interest.'" *Cameron v. United States,* 252 U.S. 450, 455, 40 S.Ct. 410, 64 L.Ed. 659 (1920); *see also Cappaert v. United States,* 426 U.S. 128, 141-142, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *United States v. California,* 436 U.S. 32, 36, 98 S.Ct. 1662, 56 L.Ed.2d 94 (1978).

Courts are severely limited in their review of congressionally authorized presidential actions:

> It has long been held that where Congress has authorized a public officer to take some specified legislative action[,] when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.

United States v. George S. Bush & Co., 310 U.S. 371, 380, 60 S.Ct. 944, 84 L.Ed. 1259 (1940) (internal citations omitted). Considering that the judgment of any public officer taking legislative action cannot be reviewed by the courts, the court deems it highly logical that presidential decisions, made pursuant to a statute that provides the President with discretion, are also not reviewable. In *George S. Bush & Co.,* the Supreme Court reviewed the President's 1934 proclamation increasing the duty on canned clams imported from Japan pursuant to the Tariff Act of 1930. *See id.* at 375, 60 S.Ct. 944; 19 U.S.C. § 1001 *et seq.* The Court explained that probing the reasoning of the President in issuing this proclamation would be an invasion of the legislative and executive domains. *See id.* at 380, 60 S.Ct. 944.

2. Analysis

While this court can evaluate whether President Clinton exercised his discretion in accordance with the standards of the Antiquities Act, this court cannot review the President's determinations and factual findings, as the plaintiffs suggest. To do so would invade the legislative and executive domains because Congress has directed that the President, "in his discretion," make these findings. *See George Bush & Co.,* at 380, 60 S.Ct. 944; 16 U.S.C § 431. Accordingly, this court limits its examination to the face of the Proclamation. *See Cameron,* 252 U.S. at 455-56, 40 S.Ct. 410; *Cappaert,* 426 U.S. at 141-142, 96 S.Ct. 2062; *Anaconda Copper Co. v. Andrus,* 14 ERC 1853, 1854 (D.Alaska 1980) (Defs.' Ex. 3).

Counts One and Two assert that President Clinton violated the Antiquities Act by not reasonably identifying objects of historic and scientific interest and by designating non-qualifying objects as the basis for the Monument. *See* Compl. ¶¶ 131-44. In contrast, the Proclamation begins by stating, "[t]he rich and varied landscape of the Giant Sequoia National Monument holds a diverse array of scientific and historic resources." *See* 65 Fed.Reg. at 24095. The Proclamation specifies, "[o]nly one other North American tree species . . . holds such lengthy and detailed chronologies of past changes and events." *See id.* In addition, "the monument is rich in rare plants," "rare amphibians," and "[a]rchaeological sites . . . are found in the monument." *See id.* at 24095-96. In sum, the Proclamation, on its face, describes with specificity the objects of historic and scientific interest to be included in the Monument and does not designate non-qualifying objects.

Count Three alleges that the Proclamation violates the Antiquities Act because the size of the Monument is not confined to the smallest area compatible with the proper care and management of the objects to be protected. *See* Compl. ¶¶ 145-53. On a similar note, Count Four asserts that the Proclamation increases the likelihood of harm to objects of historic and scientific interest within the Monument. *See id.* ¶¶ 154-60. In contrast, however, the Proclamation addresses the reason for the size of the Monument, the risk of wildfire, and the need to protect the objects of historic and scientific interest. *See* 65 Fed.Reg. at 24095-97. As required by the Antiquities Act, the Proclamation specifically states that the land reserved for the Monument consists of "approximately 327,769 acres, which is the smallest area compatible with the proper care and management of the objects to be protected. . . ." *See id.* at 24097.

Finally, a facial review of the Proclamation leads the court to determine that the plaintiffs can prove no set of facts in support of their claims that could entitle them to relief. *See George S. Bush & Co.,* 310 U.S. at 380-81, 60 S.Ct. 944; *Conley,* 355 U.S. at 45-46, 78 S.Ct. 99. Consequently, the court dismisses Counts One through Four.

C. The Court Dismisses Count Five Because the Proclamation Does Not Violate the Property Clause of the Constitution

In Count Five, the plaintiffs allege that the Antiquities Act and the Proclamation violate the Property Clause of the Constitution. *See* Compl. ¶¶ 161-68. The court disagrees.

1. The Property Clause

The Property Clause states: "The Congress shall have Power to dispose of and make all needful Rules and regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. The Supreme Court has read the Property Clause expansively, noting that "[t]he power over the public land thus entrusted to Congress is without limitations." *See United States v. San Francisco,* 310 U.S. 16, 29, 60 S.Ct. 749, 84 L.Ed. 1050 (1940). The Court has also explained that when delegating authority, Congress must provide standards to guide the authorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed. *See Yakus v. United States,* 321 U.S. 414, 425-26, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

2. Analysis

In this case, the plaintiffs claim that "Congress has ceded its Constitutional power 'to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States' by delegating unlimited discretion to the President." *See* Compl. ¶ 166. The plaintiffs allege that the Proclamation violates the non-delegation doctrine and the Property Clause because it is "without meaningful limitation." *See id.* ¶¶ 167-68.

On the contrary, the Antiquities Act establishes clear standards and limitations. The Antiquities Act details the types of objects that can be included in monuments and a method for determining the size of monuments. *See* 16 U.S.C. § 431. Even if standards and limitations are somewhat broad, "Congress does not violate the Constitution

merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby v. United States,* 500 U.S. 160, 165, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991). Therefore, the Antiquities Act represents a proper delegation of congressional authority to the President under the Property Clause.

In addition, as described above, President Clinton's Proclamation has meaningful limitations and follows the standards delineated by Congress in the Antiquities Act. *See* subsection "A" *supra;* 65 Fed.Reg. 24095-97. Accordingly, the Proclamation also does not violate the Property Clause of the Constitution. In conclusion, the court dismisses Count Five.

D. The Court Dismisses Count Six Because the Proclamation Does Not Violate the National Forest Management Act

In Count Six, the plaintiffs allege that the Proclamation violates NFMA by wrongfully withdrawing land from the National Forest System. *See* Compl. ¶¶ 169-75; 16 U.S.C. §§ 472(a) and 1600 *et seq.* This Count fails to state a claim on which relief could be granted because the Proclamation does not remove the Monument land from the National Forest System.

1. The National Forest Management Act

The National Forest Management Act of 1976 states that no land reserved from the public domain as a national forest can "be returned to the public domain except by an Act of Congress." *See* 16 U.S.C. § 1609(a). The Supreme Court has defined public domain as referring to land available for sale or settlement under homestead laws, or

other types of dispositions pursuant to land laws. *See Hagen v. Utah,* 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). NFMA also requires the Secretary of Agriculture to manage the Forest System lands, ensuring that the uses of these lands comply with other statutes. *See* 16 U.S.C. § 1600 *et seq.*

In 1978, after the enactment of NFMA, the Supreme Court commented on the use of the Antiquities Act: "A reservation under the Antiquities Act means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another." *California,* 436 U.S. at 40, 98 S.Ct. 1662. The Court explained that the Antiquities Act gives the President discretion to create a national monument and reserve land for its use. *See id.* Furthermore, the Court specified that the terms of the Antiquities Act include federal lands "owned or controlled by the United States that may already have been designated for a specific management purpose." *See id.*

2. Analysis

In creating the Giant Sequoia National Monument, President Clinton did not withdraw land from the national forest system, though he did withdraw land from disposition under public land laws, such as the sale and leasing of the land. *See* 65 Fed.Reg. at 24096. The Proclamation establishes that the Monument land will have dual status as a monument and a part of the Sequoia National Forest. *See id.* at 24098. In addition, the Proclamation explicitly states that the Secretary of Agriculture, through the Forest Service, shall manage the Monument and the underlying forest pursuant to applicable legal authorities. *See id.* at 24097; 16 U.S.C. § 1600 *et seq.*

Enacted by Congress 70 years after the Antiquities Act, NFMA does not limit the President's authority under the Antiquities Act by prohibiting proclamations that reserve land in national forests as monuments.[2] The Proclamation complies with NFMA because it does not withdraw land from the National Forest System, the Secretary of Agriculture will continue to manage the land in question, and it states that the management of the Monument must comply with existing laws. *See* 65 Fed.Reg. 24095; 16 U.S.C. § 1600 *et seq.*

Count Six fails to state a claim on which relief could be granted because the Proclamation in no way violates NFMA.

E. The Court Dismisses Counts Seven and Eight Because the APA and NEPA Do Not Apply to Presidential Actions

The court dismisses Counts Seven and Eight for lack of subject-matter jurisdiction because the Counts wrongly allege a right to judicial review pursuant to the APA and the NEPA.

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[2] Had Congress intended to limit Presidents' uses of the Antiquities Act, it could have done so as it did in the Weeks Act. *See* 16 U.S.C. § 521. With the Weeks Act, Congress required that certain lands be permanently reserved and administered as national forest lands. *See id.* This type of explicit language is absent from section 1609 of NFMA. In no way does section 1609 demonstrate a congressional intent to repeal the Antiquities Act as it applies to national forest lands.

1. The Administrative Procedure Act and the National Environmental Policy Act

The Administrative Procedure Act, 5 U.S.C. § 701 *et seq.,* provides: "A person suffering legal wrong because of *agency action,* or adversely affected or aggrieved by *agency action* within the meaning of a relevant statute, is entitled to judicial review." 5 U.S.C. § 702 (emphasis added). This provision requires a complainant to "identify some [particular] 'agency action,'" and "the 'agency action' in question must be 'final agency action.'" *Lujan v. National Wildlife Fed'n.,* 497 U.S. 871, 882, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) (internal citations omitted). The National Environmental Policy Act also applies specifically to federal agencies, making no mention of presidential actions. *See* 42 U.S.C. § 4321 *et seq.* In contrast, when Congress has imposed duties on the President, they have specifically mentioned that office. *See Alaska v. Carter,* 462 F.Supp. 1155, 1160 (D.Alaska 1978).

A court has subject-matter jurisdiction to review an agency action under the APA only when a final agency action exists. *See* 5 U.S.C. § 704. Because the President is not a federal agency within the meaning of the APA, presidential actions are not subject to review pursuant to the APA. *See Dalton v. Specter,* 511 U.S. 462, 470, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994); *Franklin v. Massachusetts,* 505 U.S. 788, 800-01, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992); *Armstrong v. Bush,* 924 F.2d 282, 289 (D.C.Cir.1991); 5 U.S.C. §§ 701(b)(1), 551(1). Applying similar logic, the President is not a federal agency for the purposes of NEPA. *See Alaska,* 462 F.Supp. at 1159-60; *Armstrong,* 924 F.2d at 289; *cf. Franklin,* 505 U.S. at 800-01, 112 S.Ct. 2767. Consequently, "the President is not subject to the impact statement requirement of NEPA

when exercising his power to proclaim national monuments under the Antiquities Act." *See id.*

On a separate point, courts will deem agency action final if (1) the action "mark[s] the 'consummation' of the agency's decisionmaking process," and (2) the action determines "rights or obligations" or resolves issues "from which legal consequences . . . flow." *Bennett v. Spear,* 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (internal citations omitted). The D.C. Circuit has explained further that final agency action must not be of a tentative or interlocutory nature. *See Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1022 (D.C.Cir.2000).

2. Analysis

In Count Seven, the plaintiffs charge that the Proclamation leaves the Monument within the National Forest System, and therefore the Monument land is subject to the NFMA planning and administrative appeal process.[3] *See* Compl. ¶ 180. In both Counts Seven and Eight, the plaintiffs seek relief pursuant to the APA, alleging that the Forest Service's management of the Monument violates the NFMA (Count Seven) and the NEPA (Count Eight). *See* Compl. ¶¶ 176-92. Also, in both Counts, the plaintiffs specifically refer to the Forest Service's current management of the Monument, which is occurring pursuant to the Clinton Proclamation, until the Secretary of Agriculture

[3] While the plaintiffs' allegations and arguments in and pertaining to Count Six focus on the assertion that the Proclamation *removes* lands from the Sequoia National Forest, the plaintiffs' allegations in Count Seven seem to contradict this notion.

devises a formal plan. *See* Compl. ¶¶ 181, 184, 187, 189; 65 Fed.Reg. at 24097. A memorandum from the Forest Supervisor and a "background document" allegedly govern the current management. *See* Compl. ¶¶ 181, 189. The plaintiffs do not allege that any of the management changes that have been instituted are not mandated by the Proclamation. *See generally* Compl.

Counts Seven and Eight both request judicial review pursuant to the APA. These Counts fail to allege jurisdiction, however, because the Forest Service is merely carrying out directives of the President, and the APA does not apply to presidential action. *See Franklin,* 505 U.S. at 800-01, 112 S.Ct. 2767; *Armstrong,* 924 F.2d at 298. Any argument suggesting that this action is agency action would suggest the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action. *See generally id.* The court refuses to give the term "presidential action" such a confusing and illogical interpretation. Using this same logic, Count Eight also fails in its claim pursuant to NEPA because NEPA requires agency action, and the action in question is an extension of the President's action. *See Alaska,* 462 F.Supp. at 1159-60.

Even if the action were agency action, this court could not review it under the APA because it is tentative, interlocutory, and therefore not final action. *See Appalachian Power Co.,* 208 F.3d at 1022. In the Proclamation, the President directs the Secretary of Agriculture to devise a management plan for the Monument within three years, with the advice of a scientific advisory board. *See* 65 Fed.Reg. at 24097. Accordingly, the current management

plan is merely a temporary measure acting on the President's immediate requests and managing the forest until the agency devises a management plan. *See* Compl. ¶¶ 176-92; Defs.' Ex. 7, Pls.' Ex 2.

In sum, as the APA only applies to final agency action, and NEPA only applies to agency action, Counts Seven and Eight fail because the court has no subject-matter jurisdiction over the allegations contained therein.

F. The Court Dismisses Count Nine Because the Proclamation Does Not Violate Existing Rights and the Matter Is Not Ripe for Review

In Count Nine, the plaintiffs allege that the Proclamation and the Forest Service's management of the lands within the boundaries of the Monument violate plaintiff's valid existing rights as created by the Mediated Settlement Agreement executed in 1990. *See* Compl. ¶¶ 193-204; Defs.' Ex. 8. The court dismisses this Count because the Proclamation does not violate existing rights and because the current management of the Monument is not ripe for judicial review.[4]

1. The Proclamation Does Not Violate Existing Rights

On its face, the Proclamation preserves existing rights by broadly asserting that "[t]he establishment of this

[4] Because the Proclamation recognizes existing rights, the court need not decide whether the M.S.A. § creates valid existing rights for the plaintiffs who were party to the MSA.

monument is subject to valid existing rights." 65 Fed.Reg. at 24097. More specifically, the Proclamation provides for the continuing existence of uses such as timber sales, water rights, and grazing permits under contract or reserved as of the date of the Proclamation. *See id.* at 24097-98. The Proclamation also states that it will not affect existing special use authorizations. *See id.* at 24098. Given the plain language of the Proclamation, the plaintiffs fail to state a claim with regard to the Proclamation.

2. The Current Management of the Monument Is Not Ripe for Judicial Review

In their complaint, the plaintiffs also raise the possibility that the Forest Service's current implementation of the Proclamation violates existing rights. *See* Compl. ¶¶ 202, 204. These claims, however, are not ripe for judicial review.

The test for ripeness requires a court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," *Abbott Labs. v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). With respect to the "fitness for judicial decision" prong, a claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agric. Products Co.,* 473 U.S. 568, 580-81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). Similarly, with respect to the "hardship to the parties" prong, an abstract harm is not sufficient; there must be an immediate harm with a "direct effect on the day-to-day business of the plaintiffs." *Texas,* 523 U.S. at 301, 118 S.Ct.

1257 (quoting *Abbott Labs.*, 387 U.S. at 152, 87 S.Ct. 1507) (internal citations omitted).

The plaintiffs cannot demonstrate ripeness with respect to their claim that the current management of the Monument violates their rights because the Secretary of Agriculture has not yet implemented the final management plan called for in the Proclamation. *See Ohio Forestry Association, Inc., v. Sierra Club et al.*, 523 U.S. 726, 732-34, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998). In addition, the plaintiffs have not pled in their complaint that any interim plan is causing them specific, imminent and certain harm. *See id.* at 738, 118 S.Ct. 1665. Therefore, the court dismisses Count Nine.

IV. CONCLUSION

For all these reasons, the court grants the defendants' motion to dismiss. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously executed and issued this 28th day of September, 2001.

ORDER
GRANTING THE DEFENDANTS' MOTION TO DISMISS

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously executed and issued this 28th day of September, 2001, it is

ORDERED that the defendants' motion to dismiss is **GRANTED**; and it is

FURTHER ORDERED that the motions to intervene and the related submissions are **DENIED** as moot; and it is

ORDERED that the motion to appear *pro hac vice* is **DENIED** as moot.

SO ORDERED.

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317 F.3d 227

United States Court of Appeals,
District of Columbia Circuit.

TULARE COUNTY, et al., Appellants,
v.
George W. BUSH, in his official capacity as President of the United States of America, et al., Appellees.
Natural Resources Defense Council, et al., Intervenors.

No. 01-5376.

Filed On: Feb. 4, 2003.

BEFORE: GINSBURG, Chief Judge, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Prior report: 306 F.3d 1138

PER CURIAM

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.*

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* A separate statement of the panel is attached.

Statement of the Panel

PER CURIAM: Contrary to **Tulare County's** argument, the court examined the complaint against a no more rigorous standard of pleading than that of Fed.R.Civ.P. 8(a). The court affirmed the district court's dismissal, for example, of Count III of the complaint because it contained no factual allegations that any part of the Monument lacked scientific or historical value. The allegation that Sequoia groves comprise only six percent of the Monument might well have been sufficient if the President had identified only Sequoia groves for protection, but he did not; the Proclamation covered natural resources present throughout the Monument area. It was therefore incumbent upon **Tulare County** to allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect. That, and nothing more, is what led the court to conclude that the complaint did not identify improperly designated lands "with sufficient particularity."

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65 FR 24095

Proclamation 7295

Establishment of the Giant Sequoia National Monument

April 15, 2000

By the President of the United States of America

A Proclamation

The rich and varied landscape of the Giant Sequoia National Monument holds a diverse array of scientific and historic resources. Magnificent groves of towering giant sequoias, the world's largest trees, are interspersed within a great belt of coniferous forest, jeweled with mountain meadows. Bold granitic domes, spires, and plunging gorges texture the landscape. The area's elevation climbs from about 2,500 to 9,700 feet over a distance of only a few miles, capturing an extraordinary number of habitats within a relatively small area. This spectrum of ecosystems is home to a diverse array of plants and animals, many of which are rare or endemic to the southern Sierra Nevada. The monument embraces limestone caverns and holds unique paleontological resources documenting tens of thousands of years of ecosystem change. The monument also has many archaeological sites recording Native American occupation and adaptations to this complex landscape, and historic remnants of early Euroamerican settlement as well as the commercial exploitation of the giant sequoias. The monument provides exemplary opportunities for biologists, geologists, paleontologists, archaeologists, and historians to study these objects.

Ancestral forms of giant sequoia were a part of the western North American landscape for millions of years. Giant sequoias are the largest trees ever to have lived, and

are among the world's longest-lived trees, reaching ages of more than 3,200 years or more. Because of this great longevity, giant sequoias hold within their tree rings multi-millennial records of past environmental changes such as climate, fire regimes, and consequent forest response. Only one other North American tree species, the high-elevation bristlecone pine of the desert mountain ranges east of the Sierra Nevada, holds such lengthy and detailed chronologies of past changes and events.

Sequoias and their surrounding ecosystems provide a context for understanding ongoing environmental changes. For example, a century of fire suppression has led to an unprecedented failure in sequoia reproduction in otherwise undisturbed groves. Climatic change also has influenced the sequoia groves; their present highly disjunct distribution is at least partly due to generally higher summertime temperatures and prolonged summer droughts in California from about 10,000 to 4,500 years ago. During that period, sequoias were rarer than today. Only following a slight cooling and shortening of summer droughts, about 4,500 years ago, has the sequoia been able to spread and create today's groves.

These giant sequoia groves and the surrounding forest provide an excellent opportunity to understand the consequences of different approaches to forest restoration. These forests need restoration to counteract the effects of a century of fire suppression and logging. Fire suppression has caused forests to become denser in many areas, with increased dominance of shade-tolerant species. Woody debris has accumulated, causing an unprecedented buildup of surface fuels. One of the most immediate consequences of these changes is an increased hazard of

wildfires of a severity that was rarely encountered in pre-Euroamerican times. Outstanding opportunities exist for studying the consequences of different approaches to mitigating these conditions and restoring natural forest resilience.

The great elevational range of the monument embraces a number of climatic zones, providing habitats for an extraordinary diversity of plant species and communities. The monument is rich in rare plants and is home to more than 200 plant species endemic to the southern Sierra Nevada mountain range, arrayed in plant communities ranging from low-elevation oak woodlands and chaparral to high-elevation subalpine forest. Numerous meadows and streams provide an interconnected web of habitats for moisture-loving species.

This spectrum of interconnected vegetation types provides essential habitat for wildlife, ranging from large, charismatic animals to less visible and less familiar forms of life, such as fungi and insects. The mid-elevation forests are dominated by massive conifers arrayed in a complex landscape mosaic, providing one of the last refugia for the Pacific fisher in California. The fisher appears to have been extirpated from the northern Sierra Nevada mountain range. The forests of the monument are also home to great gray owl, American marten, northern goshawk, peregrine falcon, spotted owl, and a number of rare amphibians. The giant sequoias themselves are the only known trees large enough to provide nesting cavities for the California condor, which otherwise must nest on cliff faces. In fact, the last pair of condors breeding in the wild was discovered in a giant sequoia that is part of the new monument. The monument's giant sequoia ecosystem remains available for the return and study of condors.

The physiography and geology of the monument have been shaped by millions of years of intensive uplift, erosion, volcanism, and glaciation. The monument is dominated by granitic rocks, most noticeable as domes and spires in areas such as the Needles. The magnificent Kern Canyon forms the eastern boundary of the monument's southern unit. The canyon follows an ancient fault, forming the only major north-south river drainage in the Sierra Nevada. Remnants of volcanism are expressed as hot springs and soda springs in some drainages.

Particularly in the northern unit of the monument, limestone outcrops, remnants of an ancient seabed, are noted for their caves. Subfossil vegetation entombed within ancient woodrat middens in these caves has provided the only direct evidence of where giant sequoias grew during the Pleistocene Era, and documents substantial vegetation changes over the last 50,000 or more years. Vertebrate fossils also have been found within the middens. Other paleontological resources are found in meadow sediments, which hold detailed records of the last 10 millennia of changing vegetation, fire regimes, and volcanism in the Sierra Nevada. The multi-millennial, annual- and seasonal- resolution records of past fire regimes held in giant sequoia tree-rings are unique worldwide.

During the past 8,000 years, Native American peoples of the Sierra Nevada have lived by hunting and fishing, gathering, and trading with other people throughout the region. Archaeological sites such as lithic scatters, food-processing sites, rock shelters, village sites, petroglyphs, and pictographs are found in the monument. These sites have the potential to shed light on the roles of prehistoric peoples, including the role they played in shaping the ecosystems on which they depended.

One of the earliest recorded references to giant sequoias is found in the notes of the Walker Expedition of 1833, which described "trees of the redwood species, incredibly large. . . ." The world became aware of giant sequoias when sections of the massive trees were transported east and displayed as curiosities for eastern audiences. Logging of giant sequoias throughout the Sierra Nevada mountain range began in 1856. Logging has continued intermittently to this day on nonfederal lands within the area of the monument. Early entrepreneurs, seeing profit in the gigantic trees, began acquiring lands within the present monument under the Timber and Stone Act in the 1880s. Today our understanding of the history of the Hume Lake and Converse Basin areas of the monument issupported [sic] by a treasure trove of historical photographs and other documentation. These records provide a unique and unusually clear picture of more than half a century of logging that resulted in the virtual removal of most forest in some areas of the monument. Outstanding opportunities exist for studying forest resilience to large-scale logging and the consequences of different approaches to forest restoration.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431) authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases, shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument to be known as the Giant Sequoia National Monument:

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Giant Sequoia National Monument, for the purpose of protecting the objects identified in the above preceding paragraphs, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Proposed Giant Sequoia National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 327,769 acres, which is the smallest area compatible with the proper care and management of the objects to be protected as identified in the above preceding paragraphs.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale, leasing, or other disposition under the public land laws including, but not limited to, withdrawal from locating, entry, and patent under the mining laws and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument. Lands and interests in lands within the boundaries of the monument not owned by the United States shall be reserved as a part of the monument upon acquisition of title thereto by the United States.

The establishment of this monument is subject to valid existing rights.

Timber sales under contract as of the date of the proclamation and timber sales with a decision notice signed after January 1, 1999, but prior to December 31, 1999, may be completed consistent with the terms of the decision notice and contract. No portion of the monument shall be considered to be suited for timber production, and no part of the monument shall be used in a calculation or provision of a sustained yield of timber from the Sequoia National Forest. Removal of trees, except for personal use fuel wood, from within the monument area may take place only if clearly needed for ecological restoration and maintenance or public safety.

The Secretary of Agriculture shall manage the monument, along with the underlying Forest, through the Forest Service, pursuant to applicable legal authorities, to implement the purposes and provisions of this proclamation. The Secretary of Agriculture shall prepare, within 3 years of this date, a management plan for this monument, and shall promulgate such regulations for its management as deemed appropriate. The plan will provide for and encourage continued public and recreational access and use consistent with the purposes of the monument.

Unique scientific and ecological issues are involved in management of giant sequoia groves, including groves located in nearby and adjacent lands managed by the Bureau of Land Management and the National Park Service. The Secretary, in consultation with the National Academy of Sciences, shall appoint a Scientific Advisory Board to provide scientific guidance during the development of the initial management plan. Board membership

shall represent a range of scientific disciplines pertaining to the objects to be protected, including, but not necessarily limited to, the physical, biological, and social sciences.

The Secretary, through the Forest Service, shall, in developing any management plans and any management rules and regulations governing the monument, consult with the Secretary of the Interior, through the Bureau of Land Management and the National Park Service. The final decision to issue any management plans and any management rules and regulations rests with the Secretary of Agriculture. Management plans or rules and regulations developed by the Secretary of the Interior governing uses within national parks or other national monuments administered by the Secretary of the Interior shall not apply within the Giant Sequoia National Monument.

The management plan shall contain a transportation plan for the monument that provides for visitor enjoyment and understanding about the scientific and historic objects in the monument, consistent with their protection. For the purposes of protecting the objects included in the monument, motorized vehicle use will be permitted only on designated roads, and non-motorized mechanized vehicle use will be permitted only on designated roads and trails, except for emergency or authorized administrative purposes or to provide access for persons with disabilities. No new roads or trails will be authorized within the monument except to further the purposes of the monument. Prior to the issuance of the management plan, existing roads and trails may be closed or altered to protect the objects of interest in the monument, and motorized vehicle use will be permitted on trails until but not after December 31, 2000.

Nothing in this proclamation shall be deemed to diminish or enlarge the jurisdiction of the State of California with respect to fish and wildlife management.

There is hereby reserved, as of the date of this proclamation and subject to valid existing rights, a quantity of water sufficient to fulfill the purposes for which this monument is established. Nothing in this reservation shall be construed as a relinquishment or reduction of any water use or rights reserved or appropriated by the United States on or before the date of this proclamation.

Laws, regulations, and policies pertaining to administration by the Department of Agriculture of grazing permits and timber sales under contract as of the date of this proclamation on National Forest System lands within the boundaries of the monument shall continue to apply to lands within the monument.

Nothing in this proclamation shall be deemed to affect existing special use authorizations; existing uses shall be governed by applicable laws, regulations, and management plans.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of April, in the year of our Lord two thousand, and of the Independence of the United States of America the two hundred and twenty fourth.

WILLIAM J. CLINTON

[Map Omitted In Printing]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TULARE COUNTY, SIERRA NEVADA ACCESS MULTIPLE-USE & STEWARDSHIP COALITION, INC., HIGH DESERT MULTIPLE-USE COALITION, INC., SIERRA FOREST PRODUCTS, INC., KENT DUYSEN, SUGARLOAFERS SNOWMOBILE ASSOCIATION, FRED WILEY, ELEANOR AND HERBERT FOERSTER, MONTECITO-SEQUOIA CAMP, INC., HAROLD KIPER d/b/a/ KIPER AND KIPER LOGGING, CALIFORNIA-NEVADA SNOWMOBILE ASSOCIATION, INC., NAVELENCIA RESOURCE CONSERVATION DISTRICT,	)
Plaintiffs,	)
v.	) **COMPLAINT**
WILLIAM JEFFERSON CLINTON, in his official capacity as President of the United States of America, THE UNITED STATES OF AMERICA, DANIEL R. GLICKMAN, in his	)

official capacity as the Secretary of the United States Department of Agriculture, THE UNITED STATES DEPARTMENT OF AGRICULTURE, MICHAEL P. DOMBECK, in his official capacity as the Chief of the Forest Service, THE UNITED STATES FOREST SERVICE, BRADLEY E. POWELL, in his official capacity as the Regional Forester for Region 5 of the Forest Service and ARTHUR L. GAFFREY, in his official capacity as the Forest Supervisor of the Sequoia National Forest,

Defendants.

Plaintiffs Tulare County, SierraNevada Access Multiple-Use & Stewardship Coalition, Inc., High Desert Multiple-Use Coalition, Inc., Sierra Forest Products, Inc., Kent Duysen, Sugarloafers Snowmobile Association, Fred Wiley, Eleanor and Herbert Foerster, the Montecito-Sequoia Camp, Inc., Harold Kiper d/b/a Kiper & Kiper Logging, California-Nevada Snowmobile Association, Inc., and Navelencia Resource Conservation District, by and through their undersigned attorneys, complain of defendants as follows:

INTRODUCTION

1. This Complaint concerns the proclamation issued by President William Jefferson Clinton on April 15, 2000, Proclamation No. 7295 (sometimes the "Proclamation" or "Clinton Proclamation"), which purports to create the Giant Sequoia National Monument (sometimes the "Monument"). The Monument includes approximately

327,769 acres of land located within the boundaries of the Sequoia National Forest in southern central California. President Clinton claims to have created the Monument under the Antiquities Act of 1906, which authorizes the President to proclaim as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" that are located on federal lands. The Antiquities Act also specifies that "the limits [of a national monument] in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."

2. Although the Monument was allegedly proclaimed "for the purpose of protecting objects identified [in the Proclamation]," the Proclamation fails to identify with reasonable specificity any qualifying objects of historic or scientific interest that actually need protection. Thus, based only on vague and generalized references, the Proclamation purports to establish a vast 327,769 acre Monument, constituting about one-third of the total land area of the Sequoia National Forest. In contrast, the total tree line area of the Giant Sequoia Groves on the Sequoia National Forest is at most less than 6% of the entire Monument area.

3. Prior to President Clinton's Proclamation, no commercial logging was permitted in the Giant Sequoia Groves or within a substantial buffer area around them, and the Groves were already subject to far-reaching protection by the Mediated Settlement Agreement of 1990 and a proclamation by President George Bush in 1992.

4. The Clinton Proclamation precludes any commercial timber sales within the entire 327,769 acres of Monument area, even in areas where commercial timber sales have

been conducted for decades without any harm whatsoever to the existing Giant Sequoia Groves. The Proclamation prohibits all off-highway vehicle use after December 31, 2000 and severely restricts the building and use of roads and trails within the Monument area. These restrictions and others imposed by the Clinton Proclamation and the current Forest Service management of the Monument significantly increase the risk of catastrophic fire. Far from protecting the Giant Sequoia Groves, the Clinton Proclamation seriously endangers the Groves and threatens the physical safety and the property of everyone in and around the Monument area. The Clinton Proclamation also increases the likelihood that a catastrophic fire started in the Monument area may spread outside the boundaries of the Sequoia National Forest.

5. The Clinton Proclamation removes the Monument area from the congressionally mandated national forest planning process and the administrative appeal system that have guaranteed procedural and substantive rights to all Monument users and insured meaningful public input into the land management planning process for the Monument area for more than 20 years.

6. By increasing the risk of catastrophic fire and significantly restricting a variety of beneficial activities within the Monument area, the Clinton Proclamation has destroyed jobs and imperiled a wide range of recreational, aesthetic and spiritual uses enjoyed by the public, including the plaintiffs in this action.

7. The Clinton Proclamation is wholly unwarranted and unnecessary. The size of the Monument grossly exceeds any reasonable area required for protection of the Giant Sequoia Groves, and the terms and conditions of the

Proclamation threaten rather than protect the Groves and the other parts of the Monument area.

8. Accordingly, plaintiffs contend that the Proclamation and the current management of the Monument violate the Property Clause of the United States Constitution, grossly exceed the specific limitations in the Antiquities Act, violate the National Forest Management Act, violate the National Environmental Policy Act, and violate the Mediated Settlement Agreement of 1990. The impact of these violations on the general public and on the individuals, businesses and families which are located in and around and regularly use the Monument area has been and continues to be severe. We respectfully ask this Court to declare the Giant Sequoia National Monument invalid on Constitutional and statutory grounds and to order that the Monument area be managed reasonably for multiple-use under the National Forest Management Act. In the alternative, should the Monument be upheld in any respect, we ask that it be limited as required by the Antiquities Act to "the smallest area compatible with the proper care and management of the objects to be protected."

JURISDICTION AND VENUE

9. The claims asserted herein arise under the United States Constitution, the Antiquities Act of 1906, 16 U.S.C. § 431 *et seq.*, the National Forest Management Act ("NFMA"), 16 U.S.C. § 472 (a), §§ 1600 *et seq.* (which incorporates the provisions of the Multiple Use-Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528 *et seq.*), the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 *et seq.*

10. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), and 28 U.S.C. § 1361 (mandamus).

11. Venue is proper in this Court under 28 U.S.C. § 1391(e) because a defendant in the action is an officer, employee or agency of the United States residing within this judicial district.

THE PARTIES

The Plaintiffs and Their Interests.

Tulare County

12. Plaintiff Tulare County is a county of the State of California. The boundaries of Tulare County enclose a significant portion of the Monument area. The County holds land near the Monument and within the Monument.

13. Residents of Tulare County own land near, adjacent to and within the Monument boundaries, and Tulare County residents frequently visit the Monument area for business purposes and for recreational, aesthetic and spiritual experiences. County residents use the Monument area's roads and trails and enjoy other motorized and mechanized uses of the Monument area.

14. The Proclamation and current management of the Monument significantly increase the threat of catastrophic fire both within the Monument and the threat of the spread of that fire outside the Monument into Tulare County. This increased threat of catastrophic fire endangers the safety, property and well-being of Tulare County residents both within the Monument area and outside of the Sequoia National Forest boundary within Tulare County.

15. The restrictions imposed by the Proclamation and the current management of the Monument on new and existing roads and trails and on off-highway vehicle use adversely affect the ability of the residents of Tulare County to use and enjoy the Monument area.

16. Within the Monument, Tulare County holds land known as Balch Park upon which it operates a campground as well as a museum that displays a photographic overview of the history of the many uses of the area in and around Balch Park. The increased risk of catastrophic fire posed by the Proclamation and the current management of the Monument threaten the safety and well-being of Balch Park and those who use it.

17. Also located on eight acres of land located entirely within the boundaries of the Monument is the County of Tulare Youth Adventure Camp (known as "Camp COTYAC"). Camp COTYAC is operated from May to October pursuant to a 20-year Forest Service permit primarily to provide outdoor experiences for youths and has recently been improved to accommodate campers with disabilities. Camp COTYAC is improved with a main lodge, sleeping cabins, restroom buildings, well and water system, campfire ring, amphitheater area, and parking area accessible by a road over what is now Monument lands. The increased risk of catastrophic fire posed by the Proclamation and the current management of the Monument threaten the safety and well-being of Camp COTYAC and those who use it.

18. Pursuant to 16 U.S.C. § 500, 25% of all monies received from timber sales on the portion of the Sequoia National Forest within Tulare County, including what is now the Monument area, are paid to the Treasurer of the

State of California for the use and benefit of Tulare County public schools and for roads. Tulare County receives hundreds of thousands of dollars annually from such timber sale receipts. The prohibition of commercial timber sales within the Monument area will significantly reduce if not entirely eliminate this important source of revenue to the County.

19. Tulare County, through its Board of Supervisors, has participated regularly in the national forest planning process on the Sequoia National Forest, including attending public meetings on behalf of the County and submitting comments on policies and proposals affecting the management of the Sequoia National Forest, including many activities within what is now the Monument boundary. The Proclamation and the current management of the Monument negates much of this public planning effort, and as a result of the Proclamation, Tulare County and its representatives will no longer be afforded these same procedural rights.

SierraNevada Access Multiple-Use & Stewardship ("SAMS") Coalition

20. Plaintiff SierraNevada Access Multiple-Use & Stewardship ("SAMS") Coalition is a California not-for-profit corporation which consists of more than 80 member organizations and more than 5,000 individuals. The total membership of all the member organizations in the SAMS Coalition approaches 100,000 individuals. The SAMS Coalition includes bicyclists, homeowners, back-country horsemen, Forest Service permit holders, snowmobile users, and search and rescue teams who use National Forest System lands, including lands located on the

Sequoia National Forest which are included in the Monument area. SAMS Coalition members frequently visit the Monument area for recreational, aesthetic, spiritual and other experiences.

21. The SAMS Coalition is dedicated to the continued use and enjoyment of National Forest System lands, including what is now the Monument area, by all Americans as provided for by the full range of multiple use authorized in MUSYA, NFMA, and NEPA.

22. SAMS Coalition members regularly comment on proposed Forest Service policies, practices and rule-making as provided for by NFMA and NEPA, attend public meetings, and contact Forest Service decision makers to present their views on management issues affecting the Sequoia National Forest lands, including the lands within the Monument area.

23. The SAMS Coalition requested that it be permitted to participate in the preparation of the management plan for the Monument but its request was denied.

24. By significantly increasing the threat of catastrophic fire and by significantly restricting the building of roads and trails and the use of roads, trails and off-highway vehicles, the Proclamation and the current management of the Monument significantly harm the ability of the members of the SAMS Coalition to use the Monument area for recreational, aesthetic, spiritual, commercial and related purposes.

25. The search and rescue teams which are SAMS Coalition members depend upon the roads and trails in the Monument area in order to save lives and prevent injury to visitors to the area. By closing roads and trails

and not building new roads or trails necessary for the safety of Monument visitors, the Proclamation and the current management of the Monument imperil the safety of those visitors and undermine the important mission of the search and rescue teams, including the critical functions performed by snowmobile search and rescue teams in winter months when timely access to remote areas of the Sequoia National Forest is essential.

High Desert Multiple-Use Coalition

26. Plaintiff High Desert Multiple-Use Coalition ("Multiple-Use Coalition") is a not-for-profit corporation organized under California law dedicated to promoting the full range of multiple use on the National Forests permitted by MUSYA, NFMA and NEPA. Members of the Multiple-Use Coalition regularly visit the Monument area for recreational, aesthetic and spiritual experiences. Among the Multiple-Use Coalition members who visit the Monument are disabled individuals for whom well-maintained roads and trails are their only practical means of access to the Monument area.

27. The Proclamation and the current management of the Monument have greatly increased the risk of catastrophic fire which seriously threatens the personal safety of members of the Multiple-Use Coalition and their ability to continue to enjoy the recreational, aesthetic, spiritual and other uses they make of the Monument area.

28. The Proclamation and the current management of the Monument which restrict the building and use of roads and trails and restrict motorized access to the Monument

area threaten the ability of the members of the Multiple-Use Coalition to continue to use and enjoy areas of the Monument.

29. The Multiple-Use Coalition administratively appealed the 1988 Land and Resource Management Plan for the Sequoia National Forest and is a party to the Mediated Settlement Agreement of 1990 which resolved that appeal and established important road and trail uses as well as a collaborative process to create a long-term Trail Plan for the Sequoia National Forest.

30. For several years, the Multiple-Use Coalition participated in the process to create the Trail Plan which was adopted by Forest Supervisor Gaffrey in a Record of Decision dated December 14, 1999.

31. The terms of the Proclamation and the current management of the Monument violate the Mediated Settlement Agreement and the Trail Plan and threaten the vehicular access of the members of the Multiple-Use Coalition to the Monument area.

Sierra Forest Products

32. Plaintiff Sierra Forest Products, Inc. ("SFP") is a small, family-operated business organized as a California corporation. Since the 1960's, SFP has been in the business of purchasing timber offered for sale by the United States Forest Service ("Forest Service") on the Sequoia National Forest. SFP has depended upon timber from the Sequoia National Forest, including timber located within the area which now constitutes the Monument, as vital raw material for its sawmills located in Dinuba and Terra Bella, California.

33. SFP has actively participated in the national forest planning process on the Sequoia National Forest as authorized under NFMA. SFP has submitted comments on draft forest plans and the projects authorized under those plans, including timber sales. SFP has participated in this process in order to promote the best multiple use of resources on the Forest and to ensure that the Forest Service's timber sales and the Forest Service's timber sale program on the Sequoia National Forest, including the area of the Forest that now constitutes the Monument, are conducted in a way that maximizes the long-term availability of timber for sale to SFP and other members of the public in a manner consistent with protecting all natural resources on the Forest.

34. The Proclamation and the current management of the Monument have harmed SFP in many respects.

35. The Proclamation has removed a significant portion of the available commercial timber base from the Sequoia National Forest. Commercial timber sales, other than those sales that were approved as of January 1, 2000, are permanently prohibited. The Proclamation and the current management of the Monument have greatly reduced the supply of timber available to SFP, and this has led SFP to close its sawmill in Dinuba, CA operated by SFP's wholly-owned subsidiary, Sequoia Forest Industries, Inc., and to lay-off all the employees at that mill permanently.

36. SFP and its 110 employees in Terra Bella and their families have suffered economic hardship and face continued economic hardship due to the establishment of the Monument and its prohibition of all commercial timber sales within the Monument area.

37. Under the terms of the Proclamation and the current management of the Monument, commercial timber sales and other activities which contribute significantly to forest fire prevention and successful forest fire suppression have been minimized or entirely eliminated. Thus, the Monument significantly increases the threat of catastrophic fire which may engulf and destroy timber and natural resources both within the Monument area and outside of that area, thereby eliminating timber resources which would otherwise be available to SFP as raw material for its mills.

38. SFP administratively appealed the 1988 Land and Resource Management Plan for the Sequoia National Forest, and is a party to the Mediated Settlement Agreement of 1990 which resolved that appeal and established important land management practices and policies, including allowing commercial timber harvests to continue in what is now the Monument area. The terms of the Proclamation and the current management of the Monument violate the Mediated Settlement Agreement by abolishing these policies and practices within the Monument area thereby causing significant economic hardship to SFP and its employees.

Kent Duysen

39. Plaintiff Kent Duysen resides with his family in Tulare County within less than 20 miles of the Monument. Mr. Duysen and his family have visited and enjoyed many areas within the Monument for more than 33 years, including the Hume Lake, Tule and Hot Springs Ranger Districts of the Sequoia National Forest. Mr. Duysen and his family continue to use these areas of the Forest for

recreation, aesthetic and spiritual purposes, including hiking, horseback riding, family camping trips, snowmobiling, and observation of the many plants and animals in the parts of the Sequoia National Forest that are now within the Monument area.

40. The Proclamation and the current management of the Monument significantly increase the risk of catastrophic fire, thereby threatening Mr. Duysen's and his family's ability to enjoy the foregoing activities and increasing the risk of physical harm to them when they are in the Monument area. In addition, the restrictions on trail and road building and the use of trails and roads and off-highway vehicles mandated by the Proclamation and the current management of the Monument threaten to curtail or eliminate these same activities.

Sugarloafers Snowmobile Association

41. Plaintiff Sugarloafers Snowmobile Association ("Sugarloafers") is a California not-for-profit organization established in 1995 consisting of approximately 173 individual members.

42. On at least 15 weekends a year, the Sugarloafers use the Forest Service roads, trails and lands within the boundaries of the Monument on the Sequoia National Forest to enjoy recreational, aesthetic and spiritual experiences in the Monument area. The Sugarloafers have been allowed to ride cross-country on unroaded portions of the Hot Springs Ranger District of the Sequoia National Forest, some of which are now located within the Monument.

43. During one of these weekends, the Sugarloafers conduct a joint event with the Porterville Sheltered Workshop, a local organization dedicated to meeting the needs of mentally and physically challenged adults. At their annual event the Sugarloafers provide tow rides to the clients of the Sheltered Workshop in an unroaded meadow located within the boundaries of the Monument.

44. The Sugarloafers has been an active participant in providing comments on snowmobile use issues within the Sequoia National Forest and attending public meetings with the Forest Service on such issues as part of the national forest planning process. By removing the Monument area from the national forest planning process, the Proclamation deprives the Sugarloafers of the opportunity to participate in this public planning process.

45. The Proclamation and the current management of the Monument severely restrict and may eliminate the Sugarloafers' ability to enjoy the Monument area for individual and group snowmobile activities.

Fred Wiley

46. Plaintiff Fred Wiley is an owner of approximately one and one-half acres of private land in the Sugarloaf Mountain Park Subdivision which is located entirely within the boundaries of the Monument. This property is improved with an 1100 sq. foot, three-room home which Mr. Wiley and his family use as a weekend and vacation home throughout the year.

47. Access to the Wiley property is currently possible only as authorized by a Forest Service class D permit allowing use of a Forest Service road over Forest Service

property within the boundaries of the Monument. When deep snow has fallen, access to the Wiley property is only possible via snowmobile over the Forest Service road.

48. Mr. Wiley uses lands within the Monument area for snowmobiling, including but not limited to the Bull Run trail.

49. By significantly increasing the likelihood of catastrophic fire, the Proclamation and the current management of the Monument severely threaten the safety of Mr. Wiley and his family and their property as well as their access to Mr. Wiley's property. The increased likelihood of catastrophic fire also threatens the ability of Mr. Wiley and his family to use and enjoy the Monument area.

50. By restricting the building and use of roads and trails and restricting motorized off-highway use, the Proclamation and the current management of the Monument significantly threaten the personal safety of Mr. Wiley and his family and their access to Mr. Wiley's property. In the same way, the Proclamation and the current management of the Monument threaten the ability of Mr. Wiley and his family to use the Bull Run Trail and other areas for snowmobiling and other forms of motorized recreation.

Eleanor and Herbert Foerster

51. Plaintiffs Eleanor L. and Herbert A. Foerster (the "Foersters") currently hold a twenty-year Forest Service permit for Lot 2 within the Upper McIntyre area located entirely within the boundary of the Monument on the Tule Ranger District of the Sequoia National Forest. The Foersters' permit for Lot 2 is scheduled to expire in 2008.

52. For four generations and more than 50 years, the Foersters, through Eleanor Foerster, have continuously held Forest Service permits for Lot 2 in the McIntyre area. Lot 2 is improved with a three-room cabin owned by the Foersters. The Foersters' cabin is located within 50 yards of Giant Sequoias in the McIntyre Grove within the Monument.

53. The only vehicular access to the Foersters' cabin is across Forest Service land via a narrow, one lane path, the building and use of which was permitted by the Forest Service. The Foersters' access permit is scheduled to expire in 2005.

54. The Foresters' Forest Service permit for Lot 2 requires their use of the cabin for at least two weeks of the year. The Foresters' actual use of the cabin on Lot 2 has always greatly exceeded this amount. While at the cabin, the Foresters enjoy many recreational, aesthetic and spiritual experiences in the Monument area, including hiking in the summer, cross-country skiing and snowshoeing on roads and trails in the winter and observing the diverse plant and animal life in the Monument area.

55. The Foersters are active participants in the national forest planning process on the Sequoia National Forest in the Monument area and have frequently submitted comments on proposed Forest Service land management and planning within that area and often have attended and spoken at public meetings and conferences held to discuss such matters.

56. The increased threat of catastrophic fire caused by the Proclamation and the current management of the Monument threatens the safety and well-being of the

Foersters and their ability to use and enjoy their cabin and the Monument area.

57. The restrictions on building new roads and trails and on the use of existing roads, trails and off-highway vehicles threaten the safety of the Foersters and their access to their cabin and areas they use for recreation and other purposes within the Monument. These restrictions also threaten the Foersters' ability to use and enjoy the Monument area.

58. The Proclamation and the management of the Monument also deprive the Foersters of their right to participate in the national forest planning process which ensures them a voice in the policies and practices which regulate their use and enjoyment of the Monument area.

Montecito-Sequoia Camp

59. Plaintiff Montecito-Sequoia Camp, Inc. (the "Sequoia Camp") is a California corporation operating a year-round family resort on 42 acres of the Hume Lake Ranger District of the Sequoia National Forest within the Monument area.

60. The Sequoia Camp currently operates pursuant to a 30-year resort permit approved by the Forest Service in 1994.

61. The Sequoia Camp has been in operation for approximately 46 years and can accommodate up to 49 families at a time in its 36 lodge rooms and 13 cabins. During its peak months of operations, the Sequoia Camp employs a staff of 77.

62. During the summer months the Sequoia Camp provides its patrons with access to numerous recreational, aesthetic and spiritual activities including hiking, mountain biking and horseback riding and observing the plant and animal life within the Monument area. These activities take place primarily on Sequoia National Forest roads, trails and old logging roads within the Monument area.

63. During the winter months the Sequoia Camp provides its patrons with activities such as snowboarding and tubing accessible by a 375-foot lift as well as 80 kilometers of groomed cross-country ski trails utilizing Sequoia National Forest roads, trails, logging roads and off-highway areas within the Monument area as specified in its resort permit. The cross-country ski trails are groomed by motorized means which the Proclamation now prohibits.

64. By increasing the risk of catastrophic fire, the Proclamation and the current management of the Monument threaten the safety and well-being of the Sequoia Camp, its employees and its patrons and threaten the destruction of the parts of the Monument area they use. The risk of catastrophic fire also threatens the economic well-being of the Sequoia Camp.

65. As a result of the restrictions imposed on building new roads and trails and the restrictions on the use of existing roads, trails and off-highway vehicles, the Proclamation and the current management of the Monument restrict or eliminate the activities which the Sequoia Camp can provide to its patrons, thereby adversely affecting the business of the Sequoia Camp.

Harold Kiper

66. Plaintiff Harold Kiper has been in the logging business for more than 43 years. He operates under the business name Kiper & Kiper Logging. His business has always relied on logging Forest Service timber sales on the Hume Lake Ranger District of the Sequoia National Forest in the Monument area. He currently employs 18 people in his logging business and has made a substantial capital investment in logging tools and equipment.

67. Over the past five years approximately 90% of Mr. Kiper's logging work has been performed on Forest Service timber sales located on the Hume Lake District of the Sequoia National Forest, predominantly on lands within the boundaries of the Monument.

68. The prohibition of commercial timber sales mandated by the Monument and the current management of the Monument has caused and will cause significant economic harm to Mr. Kiper and threatens to deprive him of his livelihood of more than 43 years. In addition, the increased threat of catastrophic fire resulting from the Proclamation and the current management of the Monument threaten Mr. Kiper's and his employees' physical safety and increase the likelihood that fire may spread from the Monument area to other areas of the forest or to private land and destroy other logging opportunities which Mr. Kiper otherwise might have.

California-Nevada Snowmobile Association

69. Plaintiff California-Nevada Snowmobile Association, Inc. ("CNSA") is a not-for-profit corporation consisting of more than 2,400 individual members and 36 snowmobile

clubs. CNSA is dedicated to protecting and preserving responsible snowmobile access to and use of lands in California and Nevada, including the Monument area of the Sequoia National Forest.

70. Members of CNSA regularly use National Forest lands, including roads, trails and lands on the Sequoia National Forest that are now located within the Monument, to enjoy recreational, aesthetic and spiritual experiences.

71. CNSA has been an active participant in providing comments on snowmobile issues within the Sequoia National Forest, and provided input into the Trail Plan that was prepared in a collaborative effort pursuant to the Mediated Settlement Agreement and which was to govern future use and access to roads, trails and lands within the Sequoia National Forest.

72. The Proclamation and the current management of the Monument have greatly increased the risk of catastrophic fire which seriously threatens the personal safety of members of CNSA and their ability to continue to enjoy the recreational, aesthetic, spiritual and other uses they make of the Monument area.

73. The Proclamation and the current management of the Monument which restrict the building of new roads and trails within the Monument area and restrict the use of roads, trails and lands by motorized vehicles, including snowmobiles, harm the ability of the individual members of CNSA and its member clubs to continue to use areas of the Monument.

Navelencia Resource Conservation District

74. Plaintiff Navelencia Resource Conservation District ("Navelencia RCD") is one of 103 special independent conservation districts established under California law to promote conservation, including forest stewardship, watershed planning and management, water quality protection, soil conservation and wildlife habitat enhancement and protection on both public and private land. As part of its mission the Navelencia RCD provides resource conservation and management assistance to landowners, farmers and permit holders, including landowners and permit holders on lands within the Monument area.

75. The geographic boundary of the Navelencia RCD includes a portion of the Monument area.

76. The increased threat of catastrophic fire posed by the Proclamation and the current management of the Monument threatens the watersheds, wildlife, soil and forest which the Navelencia RCD is charged under State law with enhancing and conserving.

77. In order to fulfill its mission of conservation the Navelencia RCD seeks to maintain the fullest array of management options possible to optimize resource conditions in the RCD, including an adequate quantity and quality of water flow for all of its constituents. The restrictions imposed on the Monument area by the Proclamation and the current management of the Monument undermine and substantially weaken the ability of the Navelencia RCD to fulfill its mission.

The Defendants.

78. Defendant William Jefferson Clinton is the President of defendant the United States of America and, in his official capacity, he signed the Proclamation purportedly creating the Giant Sequoia National Monument.

79. Defendant Daniel R. Glickman is the Secretary of defendant the United States Department of Agriculture. In his official capacity, Secretary Glickman is responsible for implementing MUSYA, NFMA and NEPA on National Forest System lands administered through the Forest Service. At the President's request, Secretary Glickman provided a recommendation that the President proclaim a National Monument in excess of 300,000 acres to preserve the Giant Sequoia Groves and their ecosystems.

80. The Proclamation delegated authority for final decisions regarding management of the Monument to Secretary Glickman.

81. Defendant the Forest Service is the federal agency through which the Department of Agriculture administers the National Forest System pursuant to MUSYA, NFMA and NEPA. The Proclamation delegated authority to the Secretary of Agriculture to manage the Monument through the Forest Service.

82. Defendant Michael P. Dombeck is the Chief of the Forest Service. Defendant Dombeck is the highest ranking employee of the Forest Service. He is generally responsible for the management of the National Forest System which includes the Sequoia National Forest and the Monument area.

83. Defendant Bradley E. Powell is the Regional Forester for Region 5 of the Forest Service. Region 5 encompasses

all the administrative units of the National Forest System in California, including the Sequoia National Forest. Defendant Powell supervises the management of all the national forest land in Region 5, including the Monument area of the Sequoia National Forest. Defendant Powell reports to defendant Dombeck.

84. The Mediated Settlement Agreement was signed on behalf of the United States Department of Agriculture by a predecessor of defendant Powell, in his official capacity as Regional Forester.

85. Defendant Arthur L. Gaffrey is the Forest Supervisor for the Sequoia National Forest. In his official capacity, defendant Gaffrey is responsible for overseeing the day-to-day management of the Sequoia National Forest, including the Monument area. Defendant Gaffrey reports to the Regional Forester, defendant Powell. Defendant Gaffrey has issued direction to Sequoia National Forest employees instructing them how they should manage the Monument.

86. The Mediated Settlement Agreement was signed by a predecessor of defendant Gaffrey, in his official capacity as Forest Supervisor.

FACTUAL BACKGROUND

87. In 1988, pursuant to the requirements of NFMA and NEPA the Forest Service adopted a Land and Resource Management Plan ("LRMP") for the Sequoia National Forest including the lands contained within what is now the Monument. Pursuant to management direction contained in the LRMP, the old-growth Giant Sequoias were to be preserved and, except for emergency rehabilitation due to catastrophic events, no new management activities

were to be planned that would affect Giant Sequoia trees until a Forest-wide Giant Sequoia management implementation plan was completed. Giant Sequoia reproduction was to be encouraged and thinning was to be performed to enhance the health and vigor of the young trees.

88. This LRMP was administratively appealed by certain environmental organizations, in part, as not providing enough protection for the Giant Sequoia Groves. Additional aspects of the LRMP were challenged by other organizations including SFP and the Multiple-Use Coalition, plaintiffs in the instant case.

89. In 1990 several of the appellants of the LRMP and the Forest Service entered into a binding Mediated Settlement Agreement ("MSA"). The parties to the MSA, including the United States, the Sierra Club, the Wilderness Society and the Natural Resource Defense Council agreed that "the Giant Sequoia Groves in the Sequoia National Forest (the "Groves") are a unique national treasure that shall be preserved" and further agreed that "the goal for the administration of the Groves shall be to protect, preserve, and restore the Groves for the benefit and enjoyment of present and future generations."

90. The MSA establishes a 300-500 foot buffer around the outermost perimeter of the Giant Sequoia Groves within which no logging and only restricted mechanical entry can take place.

91. The MSA struck an agreed upon, balanced approach to continued commercial logging on the Sequoia National Forest, including a substantial portion of the Monument area where commercial logging had traditionally been conducted and could continue to be conducted without any significant threat of harm to the Groves.

92. The MSA expressly permitted recreational use, including the use of designated trails and off-highway vehicles ("OHV") on the Sequoia National Forest and within what is now the Monument area. On December 14, 1998, defendant Gaffrey issued a record of decision and final Trail Plan for the Forest consistent with the MSA. This final Trail Plan provided for the use, maintenance, protection and expansion of the trail system, including OHV use, within the Monument area and other parts of the Sequoia National Forest. Following the issuance of President Clinton's Proclamation in April 2000, and as a result of that Proclamation, defendant Gaffrey withdrew the final Trail Plan and its record of decision.

93. The parties to the MSA agreed that the MSA is to be incorporated into the LRMP for the Sequoia National Forest, but that the MSA would govern activities on the Sequoia National Forest "starting immediately."

94. On July 14, 1992, President Bush issued a Proclamation (the "Bush Proclamation") directing that the Giant Sequoia Groves as identified pursuant to the MSA were to be managed, protected and restored by the Secretary of Agriculture through the Forest Service to assure the preservation of the Groves for the benefit and enjoyment of present and future generations.

95. The Bush Proclamation provides that the Groves are not to be managed for timber production and are not to be included in the land base used to establish allowable sale quantities of timber for the Sequoia National Forest and other affected national forests.

96. The Bush Proclamation also requires that the Groves are to be withdrawn from all forms of location and entry under the general mining laws, and from any disposition

under the mineral and geothermal leasing laws and laws pertaining to the disposal of mineral material, subject to valid existing rights.

97. In 1994, the Chief of the Forest Service, Jack Ward Thomas, a wildlife biologist, testified before Congress that proposed legislation to create a Giant Sequoia preserve, including most of what is now the Monument area, was unwise because "flexibility to choose [management] methods where they are appropriate is essential to retaining sequoia groves over time."

98. On February 14, 2000, despite the existence of the foregoing protections for the Groves and the foregoing testimony of the Clinton Administration's Chief of the Forest Service, President Clinton, at the request of preservation activists, sent a letter to Secretary Glickman specifically asking the Secretary for his "recommendation regarding whether appropriate stewardship for the sequoia groves warrants exercise of my authority under the Antiquities Act. . . . " The President's letter requested a response from Secretary Glickman within 60 days, *i.e.*, on or before April 14, 2000.

99. Although the President's February 14, 2000 letter sought a recommendation only regarding "appropriate stewardship for the sequoia groves," by March 3, 2000, the Forest Service had announced a meeting to explore three much broader questions, namely:

> 1. What land area is ecologically necessary for the proper care and management of the giant sequoia and their ecosystems?
>
> 2. Are there other historic, prehistoric, or ecological values that should be considered for inclusion in a National Monument designation?

> 3. What sort of actions (management) are needed for the proper care of the giant sequoia and their ecosystems?

100. There was considerable opposition to the establishment of the Monument from academics, current and former government officials and bi-partisan members of the California congressional delegation based upon the view that Monument status would substantially foreclose management options, and that this would be detrimental for the Giant Sequoia Groves.

101. On April 7, 2000, the Department of Agriculture issued a press release stating that Secretary Glickman had recommended to President Clinton the proclamation of a 355,000-acre Giant Sequoia National Monument, management of which would focus on "preservation of the groves and their surrounding ecosystems."

102. Secretary Glickman's recommendation improperly included non-federal lands in its calculation of acres within the Monument.

103. Eight days after issuance of the Department of Agriculture press release, on April 15, 2000, President Clinton arrived on the Sequoia National Forest and issued the Proclamation purportedly creating the Giant Sequoia National Monument and withdrawing for Monument purposes approximately 327,769 acres of congressionally designated Sequoia National Forest lands.

104. The Clinton Proclamation withdraws the same acres of federal land as had been recommended by Secretary Glickman.

105. The Proclamation does not specifically identify the object(s) to be protected, state how the size of the Monument is the smallest compatible with proper care and management of the object(s), or how such a Monument will actually offer additional protection for any valid objects.

106. The Proclamation purports to provide that: "All Federal lands and interests in lands within the boundaries of this Monument are hereby appropriated and withdrawn from entry, location, selection, sale, leasing, or other disposition under the public land laws. . . ."

107. The Proclamation purports to remove all of the 327,769 acres of the Monument from consideration for management for the sustained yield harvest of timber, including substantial portions of the Forest where timber harvest had traditionally taken place without any adverse impact on the Giant Sequoia Groves and where further harvest was agreed to by the Forest Service and the other parties to the MSA. In addition, the Proclamation provides that, "[r]emoval of trees, except for personal use fuel wood, from within the Monument area may take place only if clearly needed for ecological restoration or public safety."

108. During the five years preceding the filing of the complaint in this action, approximately 91% of all commercial timber harvest on the Sequoia National Forest was within what is now the Monument area.

109. The Proclamation only permits the Forest Service to offer timber sales in the Monument area for which a Decision Notice had been signed between January 1, 1999 and December 31, 1999. Upon information and belief, only two timber sales meet this criteria.

110. At the same time that it bans commercial timber harvest as a forest fire management tool within the Monument, the Proclamation recognizes that the federal government's decades-long practice of extinguishing all wildfires as quickly as possible has resulted in heavy fuel loads and an increased risk of catastrophic fire throughout the National Forest System, including the Monument area:

> Fire suppression has caused forests to become denser in many areas, with increased dominance of shade-tolerant species. Woody debris has accumulated, causing an unprecedented build up of surface fuels. One of the most immediate consequences of these changes is an increased hazard of wildfires of a severity that was rarely encountered in pre-European times.

111. The Proclamation further provides that:

> [M]otorized vehicle use will be permitted only on designated roads, and non-motorized mechanized vehicle use will be permitted only on designated roads and trails, except for emergency or authorized administrative purposes or to provide access to persons with disabilities. No new roads or trails will be authorized within the monument except to further the purposes of the monument. Prior to the issuance of the management plan, existing roads and trails may be closed or altered to protect the objects of interest in the monument, and motorized vehicle use will be permitted on trails until but not after December 31, 2000.

112. The Monument is expressly "established subject to valid existing rights."

113. The Proclamation purports not to revoke "any existing withdrawal, reservation or appropriation," and the Secretary of Agriculture is directed by the Proclamation to "manage the monument, along with the underlying Sequoia National Forest, through the Forest Service, pursuant to applicable legal authorities, to implement the purposes and provisions of this proclamation."

114. The Proclamation purports not "to affect existing special use authorizations" and directs that "existing uses shall be governed by applicable laws, regulations and management plans," including the Sequoia National Forest Land and Resource Management Plan.

115. The Forest Service became responsible for managing the Monument under the terms of the Proclamation immediately after the Proclamation was issued by President Clinton.

116. The Proclamation directs the Secretary of Agriculture to prepare a management plan for the Monument to be completed within three years. The Forest Service has announced that it is starting to work on the plan which it projects will be completed in April 2003.

117. On June 2, 2000, defendant Gaffrey, the Forest Supervisor for the Sequoia National Forest, issued a memorandum to all of the District Rangers on the Sequoia National Forest stating that "[s]tarting immediately we will manage the Monument according to policies and terms of that Proclamation and as further explained in the document titled 'Background Information on Giant Sequoia National Monument.'"

118. The document titled "Background Information on Giant Sequoia National Monument" referred to in the

Forest Supervisor's June 2, 2000 memorandum is not signed, is not dated, bears no indication as to who prepared it and is not referred to in the Proclamation.

119. In his June 2, 2000 memorandum, the Forest Supervisor announced that "in effect, the Proclamation overlays and pre-empts existing direction except where statute and policy explicitly direct otherwise, *e.g.*, a wilderness area."

120. The Forest Supervisor explained to the District Rangers that "[w]hile giant sequoia groves are the centerpiece of the Monument, the giant sequoia ecosystem and other features named in the Proclamation are considered 'objects of interest' that we are pledged to protect." The June 2, 2000 memorandum further directs:

> Pending completion of the Monument Plan and accompanying regulations [which could take three years or more] every new decision and ongoing project must contribute to the purpose for which the monument was created. That is, *you must answer the question, does a given activity provide for the protection of the objects of interest*?

121. The Forest Supervisor did not provide and has not provided to the District Rangers or anyone else any specific identification of all the objects to be protected by the Monument.

122. On information and belief, as of the filing of this complaint, all the objects to be protected by the Monument have not been reasonably identified by defendants or their subordinates.

123. The Forest Service has recognized for many years the serious threat of catastrophic fire developing on the

Sequoia National Forest and within what is now the Monument area. The Forest Service has prepared maps and studies of fire risk which demonstrate that substantial portions of the Monument area consist of land in the Forest Service's highest risk category for wildfire.

124. For many years the Forest Service has recognized that in the national forests, including the Monument area, more than 100 years of fire prevention activities first by European settlers and later by the Forest Service has created favorable conditions for catastrophic fire which can destroy all wildlife and vegetation in its wake and bake the earth beneath the fire up to several inches, thereby destroying virtually all forms of life.

125. Prior to the fire prevention activities undertaken by individuals and by the government, smaller, less severe fires occurred in what are now our national forests, including the Monument area, on a periodic basis. These fires cleared brush and reduced fuel loads but generally left unharmed a significant number of large trees capable of reproducing the forest and sustaining wildlife.

126. On or about July 26, 2000, the Manter wildfire began in the Domeland Wilderness located on the Sequoia National Forest. The government does not permit commercial timber sales, and only rarely permits any mechanized treatment, roads, or any mechanical equipment in Wilderness areas, including the Domeland Wilderness.

127. As the Manter fire spread, voluntary evacuation orders were issued to the community of Kennedy Meadows within the Sequoia National Forest which is approximately 19 miles from the Monument area. A Type 1 Incident Management Team, generally the largest team

available, was assigned by the Forest Service to combat the Manter fire.

128. As the Manter fire continued to spread rapidly, youth camps and other facilities were evacuated. Residences and other structures within the Sequoia National Forest were destroyed.

129. Before finally being contained on or about August 9, 2000, the Manter fire burned over 74,010 acres in and around the Sequoia National Forest, an area nearly twice the size of the District of Columbia. The fire was battled by more than 1,100 persons using 44 engines and 6 helicopters. Efforts to contain the fire cost an estimated $11.2 million.

130. The Proclamation and the current management of the Monument area increase the risk that a fire like the Manter fire could start in the Monument area and spread rapidly with destructive force to destroy the Giant Sequoia Groves and other plants and animals in and around the Monument area. Such a fire would also threaten the safety and well-being of individuals and their property within and near the Monument area.

CLAIMS FOR RELIEF

Count I – The Clinton Proclamation Violates the Antiquities Act Because the Alleged Objects of Historic and Scientific Interest It Was Created To Protect Were Not and Have Not Been Reasonably Identified.

131. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-130.

132. Section 2 of the Antiquities Act, 16 U.S.C. § 431, authorizes the President "to declare by public proclamation historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the government of the United States to be national monuments. . . ."

133. The sole purpose of a national monument created by Presidential Proclamation under the Antiquities Act is to protect objects of genuine historic or scientific interest.

134. The Antiquities Act does not authorize the President to issue a proclamation establishing a national monument unless the President first reasonably identifies by physical description and geographic location the objects of genuine historic or scientific interest that are to be protected by the Monument.

135. The Antiquities Act does not authorize the President to set aside national forest land to create new national parks, wilderness areas or other types of restricted use land areas which are not necessary for the protection of specific objects of historic or scientific interest.

136. The Clinton Proclamation, which purports to establish a 327,769 acre Giant Sequoia National Monument, does not identify with reasonable specificity the objects of historic or scientific interest which are the necessary predicates for the Proclamation and the Monument.

137. Prior to issuing the Proclamation, neither President Clinton nor any authorized representative of the Executive Branch had reasonably identified all the objects of historic or scientific interest which are necessary to justify the 327,769 acre Monument.

138. To date, the objects of historic or scientific interest necessary to justify the establishment of the Monument have still not been identified with the specificity required by the Antiquities Act.

139. Plaintiffs are entitled to a judgment declaring that the Proclamation is invalid and in violation of Section 2 of the Antiquities Act because the objects of historic or scientific interest which are the necessary predicates of the Proclamation and the Monument have not been identified with reasonable specificity.

Count II – The Clinton Proclamation Violates the Antiquities Act Because It Designates Non-Qualifying Objects as the Basis for the Monument.

140. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-139.

141. Section 2 of the Antiquities Act, 16 U.S.C. § 431, limits the President's discretion to declare national monuments by public proclamation to "historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest."

142. The designated "objects" of the Monument must be bona fide physical objects that are specifically identified and have a definite geographic location. Landscapes, scenic areas, ecosystems or other items with amorphous features do not qualify as objects under the Antiquities Act.

143. The Clinton Proclamation purports to designate landscapes, scenic areas, ecosystems and other amorphous and imprecise items as objects of historic or scientific interest allegedly protected by the Monument. These items

do not meet the minimum qualifications for objects to be protected by a proclamation issued under the Antiquities Act.

144. Plaintiffs are entitled to judgment declaring that the approximately 327,769 acre Giant Sequoia National Monument is invalid and in violation of Section 2 of the Antiquities Act.

Count III – The Size of the Monument Is Not Confined to the Smallest Area Compatible with Proper Care and Management of the Objects To Be Protected and Therefore the Proclamation and the Monument Are in Violation of the Antiquities Act.

145. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-144.

146. Section 2 of the Antiquities Act, 16 U.S.C. § 431, limits the President's discretion to include parcels of lands as part of a national monument as follows:

> The President . . . may reserve as part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

147. Any land parcels included in the Monument must be confined to the smallest area reasonably necessary for protection of the designated historic or scientific objects.

148. The Antiquities Act does not authorize the President to withdraw land parcels for inclusion in a Monument which are not necessary for the protection of valid objects nor does it authorize the President to engage generally in land use planning or permit the President to establish

monuments merely in order to withdraw national forest land from the multiple-use requirements of NFMA.

149. Prior to issuing the Proclamation, neither President Clinton nor any other defendant nor their subordinates made any meaningful investigation or determination of the smallest area necessary to protect any specifically identified objects of genuine historic or scientific interest.

150. President Clinton proclaimed the 327,769 acre Giant Sequoia National Monument without any meaningful effort to ensure that the size of the Monument was limited "to the smallest area compatible with the proper care and management of the objects to be protected," but instead bowed to political pressure from preservation activists and catered to the preexisting political and aesthetic agenda of those activists in designating a grossly oversized Monument unnecessary for the protection of any objects of genuine historic or scientific interest.

151. To date, the defendants have still made no meaningful investigation or determination of the minimum area required for the Monument.

152. The Proclamation violates the Antiquities Act because the President failed to comply with the Antiquities Act's requirement that the Monument be limited "to the smallest area compatible with the proper care and management of the objects to be protected."

153. Plaintiffs are entitled to a judgment declaring that the Proclamation is invalid and the creation of the Monument is ineffective because the Proclamation violates the Antiquities Act.

Count IV – The Clinton Proclamation Violates the Antiquities Act Because It Increases the Likelihood of Harm to any Objects of Alleged Historic or Scientific Interest Within the Monument Area Rather Than Protecting Those Objects.

154. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-153.

155. The President is only authorized by the Antiquities Act to declare national monuments for the purpose of protecting objects of genuine historic or scientific interest. Although the Clinton Proclamation does not adequately identify any objects of genuine historic or scientific interest to be protected by the Monument, the Proclamation purports to afford protection for such objects.

156. The Proclamation acknowledges that there is presently a severe risk of catastrophic wildfire within the Monument area that is the direct result of many decades of federal government policy and practice in suppressing all wildfires.

157. Catastrophic fire occurring as a result of natural causes or human negligence in the Monument area can spread rapidly over thousands of acres destroying all plant and animal life in its path.

158. As evidenced by the Cerro Grande fire that destroyed much of a national monument in the Los Alamos, New Mexico area in the summer of 2000, so-called "prescribed burns" intentionally started by the federal government as a means of eliminating or minimizing fuel level buildup in a Monument area, cannot be controlled with certainty and do not necessarily eliminate the need for timber harvesting to reduce overstocking and high levels of fuel.

159. By forbidding commercial timber harvest, unduly restricting the removal of trees and strictly limiting the construction and use of roads and trails which may be necessary for fire fighting, among other restrictions, the Proclamation and the current management of the Monument increase the likelihood that catastrophic fire will start and spread disastrously within the Monument area and to lands outside the Monument.

160. Plaintiffs are entitled to judgment declaring that the Clinton Proclamation is in violation of the Antiquities Act and is invalid and that the creation of the Monument is ineffective because the Proclamation fails to protect any purported Monument objects and in fact renders their harm or destruction more likely.

Count V – The Clinton Proclamation Violates the Property Clause of the Constitution.

161. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-160.

162. The Property Clause of the Constitution of the United States provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

163. The full and exclusive power to set policy and make planning decisions regarding the use of federal lands, to make withdrawals of federal lands, and to dispose of federal lands is conferred upon Congress by the Constitution.

164. The President has no Constitutional power to engage in land use planning or establish land use policy independent of a valid delegation from Congress.

165. Without any approval or delegation by Congress, the Clinton Proclamation and the current management of the Monument impose and implement numerous land use policies and practices, including a prohibition on commercial timber sales and restrictions on the building and use of roads and trails.

166. If this Court determines that President Clinton is authorized under the Antiquities Act to issue the Proclamation creating the 327,769 acre Giant Sequoia National Monument purportedly for the purpose of protecting undefined, vague and amorphous entities such as "ecosystems," "landscapes," and other features which are not specifically identified or located geographically, then in this instance Congress has ceded its Constitutional power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the Unites [sic] States" by delegating unlimited discretion to the President.

167. President Clinton's interpretation of the breadth of his discretion under the Antiquities Act in proclaiming the Giant Sequoia National Monument is without any meaningful limitation and therefore the Proclamation is unconstitutional and in violation of non-delegation doctrine.

168. Plaintiffs are entitled to a judgment declaring the Proclamation invalid and the creation of the Giant Sequoia National Monument ineffective because President Clinton's Proclamation violates the Property Clause of the Constitution.

Count VI – The Clinton Proclamation Violates the National Forest Management Act by Wrongfully Withdrawing Land From the National Forest System.

169. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-168.

170. The MUSYA of 1960, which is incorporated as part of NFMA, states: "It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897."

171. Section 9 of NFMA, states:

> Congress declares that the National Forest System consists of federally owned forest, range, and related lands throughout the United States and its territories, united into a nationally significant system dedicated to the long-term benefit for present and future generations, and that it is the purpose of this section to include all such areas into one integral system. The "National Forest System" shall include all national forest lands reserved or withdrawn from the public domain of the United States, all national forest lands acquired through purchase, exchange, donation, or other means, the national grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act and other lands, waters, or interest therein which are administered by the Forest Service as part of the system. Notwithstanding the provisions of the Act of June 4, 1897, no land now or hereafter

> reserved or withdrawn from the public domain as national forests pursuant to the Act of March 3, 1891, or any act supplementary to and amendatory thereof, shall be returned to the public domain except by Act of Congress.

16 U.S.C. § 1609(a) (citations to legislative acts omitted).

172. Through NFMA, including section 1609, Congress reserved and provided "Congressional status" to the entire National Forest System, thereby precluding the President from unilaterally removing lands from the integrated National Forest System and its multiple-use sustained-yield objectives.

173. NFMA requires the Secretary of Agriculture to assure that management of National Forest System lands is conducted pursuant to land and resource management plans providing for multiple-use and sustained-yield of the products and services obtained from National Forest System lands and, in particular, including coordination of outdoor recreation, range, timber, watersheds, wildlife and fish, and wilderness.

174. The Clinton Proclamation withdraws approximately 327,769 acres of the Sequoia National Forest from the National Forest System lands and the multiple-use requirement of NFMA.

175. Plaintiffs are entitled to a judgment declaring the Proclamation invalid and the creation of the Monument ineffective because the Monument area, as part of the Sequoia National Forest, has been reserved by Congress, given Congressional status, and may not be removed from the National Forest System except by Act of Congress.

Count VII – The Forest Service's Current Management of the Monument Area Is in Violation of NFMA and Its Forest Planning Regulations.

176. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-175.

177. In enacting NFMA, Congress has determined that the national interest is served by public participation in the development of programs for managing forest resources that would coordinate the multiple-use and sustained-yield opportunities as provided in MUSYA. Accordingly, NFMA requires such public participation.

178. NFMA further provides that the Secretary of Agriculture, in order to meet overall multiple-use sustained-yield objectives, is to establish the "allowable sale quantity" of timber from each forest of the National Forest System, that any planned departure from that allowable sale quantity for a given decade must be consistent with the multiple-use objectives of the LRMP, and that plans for variation from the allowable sale quantity must be made with public participation.

179. Pursuant to NFMA, the Forest Service has issued regulations requiring an opportunity for public participation in formulating the policies and practices which govern the multiple-use objectives of the LRMP on the Sequoia National Forest and other national forests. These regulations also establish a system of administrative appeal under which members of the public may appeal the LRMP and amendments to the LRMP.

180. The Clinton Proclamation provides that, "nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation or appropriation; however, the

national monument shall be the dominant reservation." Thus, the Proclamation purports to leave the Monument within the National Forest System and subject to the NFMA planning and administrative appeal process. However, the NFMA planning process which requires substantial public participation before a major management change has taken place has not been followed.

181. The current management of the Monument area is being determined unilaterally by Forest Service employees guided by a memorandum from the Forest Supervisor and a so-called "background" document, none of which were prepared with public participation and the procedural safeguards that are required by the NFMA planning and appeal process.

182. The current management of the Monument area constitutes a major change in management direction by the Forest Service.

183. The regulations issued under NFMA, including 36 C.F.R. § 219(1)(f), require an amendment of the current Sequoia National Forest LRMP prior to any implementation of this new management direction.

184. Current management pursuant to the Clinton Proclamation continues despite the fact that no such amendment has been made.

185. Plaintiffs have been aggrieved and adversely affected by the Forest Service's failure to follow its own regulations requiring a Plan amendment prior to any significant change in the management of the Monument area, and plaintiffs have a right to judicial review of this action under the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*

186. Plaintiffs are entitled to a judgment declaring that the Forest Service's management of the National Forest System lands within the boundaries of the Monument without an amendment to the Forest Plan as required by NFMA and its regulations is invalid and ordering the Forest Service to follow the requirements of NFMA and its regulations before changing the management of the Monument area.

Count VIII: The Current Management of the Monument Is in Violation of the National Environmental Policy Act.

187. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-186.

188. NEPA requires every federal agency to prepare an environmental impact statement ("EIS") addressing the social, economic, and environmental impacts on the human environment of every major federal action which significantly affects the quality of the human environment. Such statements must be prepared prior to the agency's commencing the major federal action that is the subject of the statement.

189. As a direct result of the Clinton Proclamation, the Forest Service has instituted major management changes in the Monument area. These management changes constitute major federal actions significantly affecting the quality of the human environment within the meaning of NEPA.

190. The Forest Service was required by NEPA to conduct an environmental analysis and prepare an EIS before commencing its current management of the Monument

area. No such environmental analysis has been completed, and no such EIS has been prepared. The current management of the Monument area is therefore proceeding in violation of NEPA.

191. Plaintiffs have been aggrieved and are adversely affected by the Forest Service's refusal and failure to comply with NEPA prior to commencing its current management of the Monument area. Plaintiffs therefore have a right to judicial review of these actions under the Administrative Procedure Act, 5 U.S.C. §§ 500, *et seq.*

192. Plaintiffs are entitled to a judgment declaring that the Forest Service's current management of the Monument area is in violation of NEPA and an order from this Court directing the Forest Service to resume management of the Monument area strictly in accordance with the existing LRMP until all applicable NEPA procedures have been completed, including the completion of an EIS.

Count IX: The Clinton Proclamation Violates Valid Existing Rights, Including Those Contained in the Mediated Settlement Agreement.

193. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1-192.

194. The MSA executed in 1990 acknowledges that "the Giant Sequoia Groves in the Sequoia National Forest ("Groves") are a unique national treasure that shall be preserved" and further provides that "the goal for the administration of the Groves shall be to protect, preserve, and restore the Groves for the benefit and enjoyment of present and future generations."

195. The MSA struck an agreed upon, balanced approach to continue commercial logging on the Sequoia National Forest, including the Monument area.

196. The MSA provided for recreational use, including motorized and mechanized off-highway use on the Sequoia National Forest. Areas of motorized and mechanized off-highway use were to be subject to final determinations made by a Trail Plan.

197. Although the MSA was eventually to have been incorporated into the LRMP for the Sequoia National Forest through the NEPA process, the parties agreed that the MSA would govern operations on the Sequoia National Forest "starting immediately."

198. The MSA was signed by representatives of plaintiffs SFP, the Multiple-Use Coalition and, on behalf of the government, by the Supervisor of the Sequoia National Forest and the Regional Forester.

199. The MSA establishes valid existing rights of SFP, the Multiple-Use Coalition and the other MSA signatories.

200. The Proclamation purports to ban commercial logging everywhere within the boundaries of the Monument, including the lands where the MSA expressly provided that logging would be permitted to continue.

201. The Proclamation, contrary to the terms of the MSA and the Sequoia National Forest Trail Plan, purports to make changes in road, trail and off-highway use on the Sequoia National Monument.

202. The Forest Supervisor's memorandum of June 2, 2000 requires that where there is any perceived conflict between the terms of the Proclamation and the MSA, the

Forest Service will manage pursuant to the terms of the Proclamation.

203. The Clinton Proclamation violates plaintiffs' valid existing rights, including those rights established under the MSA and the Trail Plan.

204. Plaintiffs are entitled to a judgment declaring that the Proclamation and the Forest Service's management of the lands within the boundaries of the Monument are in violation of the plaintiffs' valid existing rights and directing the Forest Service to resume management of the lands within the Monument in accordance with those rights.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs request that this Court grant declaratory, temporary and permanent injunctive relief against defendants as follows:

1. Under Count I, a judgment declaring the Clinton Proclamation invalid and in violation of Section 2 of the Antiquities Act because the objects of historic or scientific interest which are the necessary predicates of the Proclamation and the Monument were not and have not been identified by the President with reasonable specificity and an order returning the lands within the Monument to management under the existing Sequoia National Forest Land and Resource Management Plan;

2. Under Count II, a judgment declaring the Clinton Proclamation invalid and in violation of Section 2 of the Antiquities Act because the Proclamation is predicated upon items which do not qualify as objects of historic or scientific interest within the meaning of the Antiquities

Act and an order returning the lands within the Monument to management under the existing Sequoia National Forest Land and Resource Management Plan;

3. Under Count III, a judgment declaring the Clinton Proclamation invalid and in violation of Section 2 of the Antiquities Act because the 327,769 acre Monument is not confined to the smallest area compatible with the proper care and management of the objects to be protected and an order returning the lands within the Monument to management under the existing Sequoia National Forest Land and Resource Management Plan; or, in the alternative, an order reducing the size of the Monument to a size that is the smallest compatible with the proper care of specific objects of genuine scientific or historic interest which the Court holds actually exist within the Monument area and returning the remainder of the land within the Monument area to management under the existing Sequoia National Forest Land and Resource Management Plan;

4. Under Count IV, a judgment declaring the Clinton Proclamation invalid and in violation of Section 2 of the Antiquities Act because the Proclamation fails to protect any objects of scientific or historic interest and in fact renders their harm more likely and an order returning the lands within the Monument area to management under the existing Sequoia National Forest Land and Resource Management Plan;

5. Under Count V, a judgment declaring the Clinton Proclamation unconstitutional because it usurps Congress' power under the Property Clause of the Constitution and an order returning the lands within the Monument area to management under the existing Sequoia National Forest Land and Resource Management Plan;

6. Under Count VI, a judgment declaring the Clinton Proclamation invalid and in violation of the National Forest Management Act and an order returning the lands within the Monument area to management under the existing Sequoia National Forest Land and Resource Management Plan;

7. Under Count VII, a judgment declaring that the Forest Service's current management of the Monument constitutes a major change in management direction under the existing Land and Resource Management Plan undertaken in violation of the National Forest Management Act and the regulations under the Act and an order returning the lands within the Monument to management under the existing Sequoia National Forest Land and Resource Management Plan until that Plan has been properly amended in accordance with the applicable regulations;

8. Under Count VIII, a judgment declaring that the Forest Service's current management of the Monument is a major federal action which significantly affects the qualify [sic] of the human environment, undertaken without the preparation of an Environmental Impact Statement as required by the National Environmental Policy Act and an order returning the lands within the Monument area to management under the existing Sequoia National Forest Land and Resource Management Plan until the Forest Service has fully complied with all of its obligations under the National Environmental Policy Act;

9. Under Count IX, a judgment declaring that the Clinton Proclamation and the Forest Service's current management of the Monument violate plaintiffs' valid existing

rights; and an order directing the Forest Service to resume management of the lands within the Monument area pursuant to the Mediated Settlement Agreement and the existing Sequoia National Forest Land and Resource Management Plan;

10. An order awarding plaintiffs their attorneys fees and costs; and

11. An order granting plaintiffs such further relief as may be appropriate.

Respectfully submitted,

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Dated: October 25, 2000

306 F.3d 1132

United States Court of Appeals,
District of Columbia Circuit.

MOUNTAIN STATES LEGAL FOUNDATION and
the Blue Ribbon Coalition, Inc.
Appellants,
v.
George W. BUSH, in his official capacity as
President of the United States of
America, et al., Appellees.

No. 01-5421.

Argued Sept. 3, 2002.
Decided Oct. 18, 2002.
Rehearing En Banc Denied Jan. 30, 2003.

Appeal from the United States District Court for the District of Columbia (No. 00cv02072).

S. Amanda Koehler argued the cause for appellants. With her on the briefs was William Perry Pendley.

Susan Pacholski, Attorney, U.S. Department of Justice, argued the cause for appellee George W. Bush. With her on the brief were Ellen Durkee, Michael Gheleta and Ann D. Navaro, Attorneys.

James S. Angell argued the cause for appellees Wilderness Society, et al. With him on the brief was Johanna Wald.

Before: EDWARDS and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

Mountain States Legal Foundation and the Blue Ribbon Coalition (hereafter "Mountain States") appeal the dismissal of their complaint challenging six Presidential Proclamations as unconstitutional and *ultra vires* actions for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mountain States contends that the district court erred by limiting its review to the face of the Proclamations rather than conducting factfinding to determine whether the President had complied with the limitations, structure, and purposes of the Antiquities Act ("the Act"), 16 U.S.C. § 431 (2000). Absent such judicial review, it contends, the Act constitutes an unconstitutional delegation of congressional authority. Mountain States maintains that its complaint stated a claim because the Proclamations reach far beyond the purpose, scope, and size of any national monuments contemplated by Congress under the Act and are contrary to various statutes relating to the protection of environmental values on federal land. We have no occasion to decide the availability or scope of judicial review of a Presidential Proclamation designating federal lands as a national monument under the Antiquities Act, for Mountain States has failed to present any factual allegation sufficient to warrant review of its *ultra vires* claim. Accordingly, we affirm the dismissal of the complaint.

I.

Near the end of his second term in office, President Clinton exercised his authority under the Antiquities Act to issue a series of Presidential Proclamations designating a handful of national monuments in the western United

States. Among these designations are the six Proclamations that Mountain States challenged in its complaint: (1) the Grand Canyon-Parashant National Monument, a "geological treasure" that encompasses an important watershed for the Colorado River and the Grand Canyon in northwest Arizona, Proclamation No. 7265, 65 Fed. Reg. 2825, 2825-26 (Jan. 18, 2000); (2) the Canyons of the Ancients National Monument in southwest Colorado, a "rugged landscape" containing "the highest known density of archaeological sites in the Nation," Proclamation No. 7317, 65 Fed. Reg. 37,243 (June 13, 2000); (3) the Cascade-Siskiyou National Monument, a "biological crossroads" in southwestern Oregon where the Cascade Range intersects with adjacent ecoregions, Proclamation No. 7318, 65 Fed. Reg. 37,249 (June 13, 2000); (4) the Hanford Reach National Monument, a habitat in southern Washington that is the largest remnant of the shrub-steppe ecosystem that once dominated the Columbia River basin, Proclamation No. 7319, 65 Fed. Reg. 37,253 (June 13, 2000); (5) the Ironwood Forest National Monument, an arid terrain in southern Arizona marked by rock art sites and other archaeological objects of scientific interest, Proclamation No. 7320, 65 Fed. Reg. 37,259 (June 13, 2000); and (6) the Sonoran Desert National Monument, a desert ecosystem containing an array of biological, scientific, and historic resources, Proclamation No. 7397, 66 Fed. Reg. 7354 (Jan. 22, 2001).

Mountain States alleged in its complaint that the President acted unconstitutionally and *ultra vires* under the Property Clause, U.S. Const., art. IV, § 3, cl. 2, in issuing these Proclamations. In the district court Mountain States argued that the President lacked the authority to designate the monuments because the Property Clause

confers on Congress all powers relating to federal land. The focus of its argument shifted, however, when the government invoked the Antiquities Act in its motion to dismiss the complaint under Rule 12(b)(1) and (b)(6). The government argued that because the President had issued the Proclamations under the Antiquities Act, judicial review was limited to whether the President exercised his discretion in accordance with the standards in the Act, and that review of the face of the Proclamations sufficed to dispose of Mountain States' arguments. Mountain States responded that factfinding was required to ensure that the President had acted within the scope of his statutory authority, and in particular that the court should review, in light of the statutory standards, the basis on which the President acted. According to Mountain States, Congress intended only to preserve ruins, artifacts, and other manmade objects situated on public lands – not the land itself – by the smallest possible reservation of public land necessary for protection of the monument.

The district court dismissed the complaint, ruling that the Property Clause was not at issue and that under the Antiquities Act only facial review of Mountain States' arguments was appropriate. Upon facial review, the court concluded that the President had referenced the relevant statutory standards and had not acted *ultra vires*.

II.

On appeal, Mountain States contends that, in light of the presumption of judicial reviewability of executive action, substantive review was required to ensure that substantial evidence existed to support the President's

issuance of the Proclamations. Arguing that the Proclamations' nature, size, and scope facially contravene Congress's limited purpose, which was to preserve rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts, Mountain States further contends that the Presidential actions violate other statutes governing the withdrawal of land from public use and the protection of environmental values on federal land. Hence, Mountain States maintains, the district court erred in dismissing its complaint based only on facial review of the Proclamations.

Our review of the grant of a motion to dismiss is *de novo*. *Wilson v. Pena,* 79 F.3d 154, 160 n. 1 (D.C.Cir.1996). In ruling on a motion to dismiss a complaint the district court must draw all reasonable inferences in favor of the plaintiff, *Maljack Prods., Inc. v. Motion Picture Ass'n of Am., Inc.,* 52 F.3d 373, 374 (D.C.Cir.1995), and must not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). Despite Federal Rule of Civil Procedure 8's simplified notice pleading standard, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C.Cir.1994). With this standard in mind, we turn to Mountain States' contentions.

A.

The Antiquities Act provides, in relevant part:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. . . .

16 U.S.C. § 431. Presidential Proclamations designating national monuments have been challenged in only a handful of cases; in each the court has upheld the President's action.[1] The Supreme Court has considered the Antiquities Act in three cases, each time confirming the broad power delegated to the President under the Act. *United States v. California,* 436 U.S. 32, 98 S.Ct. 1662, 56 L.Ed.2d 94 (1978); *Cappaert v. United States,* 426 U.S. 128, 141-42, 96 S.Ct. 2062, 2071, 48 L.Ed.2d 523 (1976);

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[1] *See Anaconda Copper Co. v. Andrus,* 14 Env't Rep. Cas. (BNA) 1853, 1855 (D.Alaska July 1, 1980) (President Carter's creation of monuments in Alaska); *Wyoming v. Franke,* 58 F.Supp. 890, 896 (D.Wyo.1945) (President Franklin Delano Roosevelt's designation of the Jackson Hole National Monument); *cf. Alaska v. Carter,* 462 F.Supp. 1155, 1159-60 (D.Alaska 1978) (holding that President is not subject to environmental impact statement requirements when proclaiming monuments under the Antiquities Act). See also *Tulare County v. Bush,* 306 F.3d at 1138 (D.C.Cir.2002), also decided today.

Cameron v. United States, 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659 (1920).

Although the Supreme Court has never expressly discussed the scope of judicial review under the Antiquities Act, the Court has directly addressed the nature of review of discretionary Presidential decisionmaking under other statutes. The Court has highlighted the separation of powers concerns that inhere in such circumstances and has cautioned that these concerns bar review for abuse of discretion altogether. *United States v. George S. Bush & Co.,* for example, involved § 336(c) of the Tariff Act of 1930, which provided that the President:

> shall by proclamation approve rates of duties and changes in classification and in basis of value specified in any report of the [Tariff] [C]ommission . . . if *in his judgment* such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

310 U.S. 371, 376-77, 60 S.Ct. 944, 944-45, 84 L.Ed. 1259 (1940) (quoting 19 U.S.C. § 1336(a)) (emphasis added). The statute provided for judicial review only of legal questions. The Court held that "[t]he President's method of solving the problem [of foreign exchange value] was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us." *Id.* at 379, 60 S.Ct. at 946. Similarly, in *Dalton v. Specter,* the Court considered a statute – the Defense Base Closure and Realignment Act of 1990 – that did "not at all limit the President's discretion. . . . " 511 U.S. 462, 476, 114 S.Ct. 1719, 1728, 128 L.Ed.2d 497 (1994). Judicial review was unavailable under the Administrative Procedures Act ("APA") because the President is not an "agency" within the meaning of that statute. *Id.* at

469-70, 114 S.Ct. at 1724-25 (citing *Franklin v. Massachusetts,* 505 U.S. 788, 800-01, 112 S.Ct. 2767, 2775-76, 120 L.Ed.2d 636 (1992)). The Court then "assume[d] for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA," *id.* at 474, 114 S.Ct. at 1727 (citation omitted), but it reiterated that "such review is not available when the statute commits the decision to the discretion of the President." *Id.* The Court held, "[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for our review." *Id.* at 476, 114 S.Ct. at 1726.

A somewhat different case is presented, however, where the authorizing statute or another statute places discernible limits on the President's discretion. Judicial review in such instances does not implicate separation of powers concerns to the same degree as where the statute did "not at all limit" the discretion of the President. *Id.* at 476, 114 S.Ct. at 1726; *cf. California,* 436 U.S. at 33, 98 S.Ct. at 1662-63. As this court observed in *Chamber of Commerce v. Reich,* "*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." 74 F.3d 1322, 1331 (D.C.Cir.1996) (footnote omitted). "*Dalton* is inapposite," the court explained, "where the claim instead is that the presidential action . . . independently violates" another statute. *Id.* at 1332. The court rejected the government's position "that the Procurement Act grants the President such broad discretion . . . that the case reduces only to a claim that the President abused his discretion – a claim that [the court is] not authorized to entertain." *Id.* at 1326.

It would be "untenable," the court stated, "to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant to" a statutory directive. *Id.* at 1332. Rather, the court emphasized that "'[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress. . . .'" *Id.* at 1327 (quoting *Stark v. Wickard,* 321 U.S. 288, 310, 64 S.Ct. 559, 571, 88 L.Ed. 733 (1944)). The court then held that the President had exceeded his authority under the Procurement Act in issuing an Executive Order barring federal contractors from hiring replacement workers during an economic strike because the Order was preempted by an independent statute, the National Labor Relations Act. *Id.* at 1339.

Although the limits on Presidential authority at issue derive from the Antiquities Act itself rather than an independent statute, *Reich* is instructive, for the same policy considerations apply. Courts remain obligated to determine whether statutory restrictions have been violated. In reviewing challenges under the Antiquities Act, the Supreme Court has indicated generally that review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority. *United States v. California,* 436 U.S. at 35-36, 98 S.Ct. at 1663-64; *Cappaert,* 426 U.S. at 141-42, 96 S.Ct. at 2071; *Cameron,* 252 U.S. at 455-56, 40 S.Ct. at 410-11.

The instant case, however, presents no occasion for the court to engage in *ultra vires* review of the Proclamations because Mountain States fails to allege any facts

sufficient to support its *ultra vires* claim. Mountain States alleges in its complaint merely that the six Proclamations at issue exceed the President's authority under the Property Clause and are therefore "unconstitutional and *ultra vires*." Compl. ¶¶ 84-104. No constitutional Property Clause claim is before us, as the President exercised his delegated powers under the Antiquities Act, and that statute includes intelligible principles to guide the President's actions. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474, 121 S.Ct. 903, 913, 149 L.Ed.2d 1 (2000); *Dalton,* 511 U.S. at 473-74 & n. 6, 114 S.Ct. at 1726-27 & n. 6. In responding to the government's reliance on the Antiquities Act, Mountain States argued in the district court that the President had included ineligible items within the designation – namely land – whereas the legislative history of the Act indicated, Mountain States asserted, that Congress intended only that rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts, were to be designated. That argument fails as a matter of law in light of Supreme Court precedent interpreting the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments. *See, e.g., Cameron,* 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659. And to the extent that Mountain States seeks *ultra vires* review under the Act, its complaint and statutory arguments present no more than legal conclusions. At no point has Mountain States presented factual allegations that would occasion further review of the President's actions. Rather, Mountain States' arguments contain only the bald assertion that the President acted outside the bounds of his constitutional and statutory authority. Although in reviewing the dismissal of a complaint the court, as it must, takes "all the factual allegations in the complaint as true," the court is "not bound to

accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 2944, 92 L.Ed.2d 209 (1986) (citation omitted). Moreover, the court is necessarily sensitive to pleading requirements where, as here, it is asked to review the President's actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented. *Dalton,* 511 U.S. at 474-76, 114 S.Ct. at 1727-28; *Bush,* 310 U.S. at 380, 60 S.Ct. at 946-47.

Nothing in the record before us indicates any infirmity in the challenged Proclamations. Each Proclamation identifies particular objects or sites of historic or scientific interest and recites grounds for the designation that comport with the Act's policies and requirements. For example, Proclamation 7320, 65 Fed. Reg. at 37,259, states that the Ironwood Forest National Monument "holds abundant rock art sites and other archeological objects of scientific interest." And Proclamation 7317, 65 Fed. Reg. at 37,244, states that the 164,000 acres that comprise the Canyons of the Ancients National Monument "is the smallest area compatible with the proper care and management of the objects to be protected."

To warrant further review of the President's actions, Mountain States would have to allege facts to support the claim that the President acted beyond his authority under the Antiquities Act. *See* Fed.R.Civ.P. 8(a); *Papasan,* 478 U.S. at 286, 106 S.Ct. at 2944-45; *Browning v. Clinton,* 292 F.3d 235 (D.C.Cir.2002). Having failed to do this, Mountain States presents the court with no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority. The inadequacy of Mountain States' assertions thus precludes it from showing that the district court erred in declining to engage in a

factual inquiry to ensure that the President has complied with the statutory standards. Even assuming the correctness of Mountain States' contention that *AFL-CIO v. Kahn,* 618 F.2d 784 (D.C.Cir.1979), and *Franke,* 58 F.Supp. 890, require a detailed factual review in some circumstances, those cases are not relevant in view of the inadequacy of Mountain States' allegations.

B.

Mountain States further contends, much as did appellants in *Reich,* that the Proclamations facially defy congressional intent regarding the scope and purpose of "a host" of other statutes enacted to protect various archeological and environmental values. Appellants' Br. at 5. This contention, however, misconceives federal laws as not providing overlapping sources of protection. Essentially, this contention parallels Mountain States' view of the limited scope of power delegated to the President under the Antiquities Act, specifically as not embracing environmental values.

According to Mountain States, the Endangered Species Act, 16 U.S.C. §§ 1532-44 (2000), is the "sole means" for protecting species and their habitat, and § 1133 of the Wilderness Act, 16 U.S.C. §§ 1131-36 (2000), is the "sole means" by which the federal government may withdraw land from public use to protect scenic beauty, natural wonders, or wilderness values. Appellants' Br. at 36, 37. Yet the Park Service Organic Act, 16 U.S.C. §§ 1-4 (2000), provides just one example of a statute that serves both purposes. *United States v. Brown,* 552 F.2d 817, 822 (8th Cir.1977). So, too, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-12 (2000), the National Wildlife Refuge System Act,

16 U.S.C. § 668dd (2000), the National Forest Management Act of 1976, Pub.L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) (2000), and the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (2000), all guard endangered species and their habitat. The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, the National Forest Management Act, and the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528-29, 531 (2000), also protect scenic and wilderness values. Consequently, Mountain States' contention that the Antiquities Act must be narrowly construed in accord with Mountain States' view of Congress's original intent because Congress asserted its Property Clause authority in enacting the FLPMA again misses the mark.

Accordingly, we affirm the dismissal of the complaint.

Supreme Court, U.S.
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No. 02-1623

In The Supreme Court of the United States

TULARE COUNTY, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*, NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* BILL LOCKYER, ATTORNEY GENERAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OBJECTION TO QUESTIONS PRESENTED

Because the court below did not use a heightened pleading standard in dismissing Counts I-IV of petitioners' complaint, neither question articulated by the petition is accurate and neither presents an issue for Supreme Court review, nor does the petition present any other appropriate question for resolution by this Court.

CORPORATE DISCLOSURE STATEMENT

The Natural Resources Defense Council, the Sierra Club, The Wilderness Society, and the Tule River Conservancy are all non-profit corporations with no parent company. No publicly held company owns any stock in any of them.

TABLE OF CONTENTS

	Page
OBJECTION TO QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	3
I. Dismissal of Counts I Through IV Did Not Hinge On a Heightened Standard of Factual Pleading and Presents No Issue Meriting Supreme Court Review	5
A. Count I Fails as a Matter of Law	5
B. Count II Fails as a Matter of Law	5
C. Count III Fails as a Matter of Law	6
D. Count IV Fails as a Matter of Law	7
II. Count V Provides No Occasion for Review By This Court	8
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Cappaert v. United States, 426 U.S. 128 (1976) 6

Conley v. Gibson, 355 U.S. 41 (1957) 3, 4

Dalton v. Specter, 511 U.S. 462 (1994) 8

Mountain States Legal Foundation v. George Bush, 306 F.3d 1132 (D.C. Cir. 2002) 4

Tulare County v. Bush, 185 F.Supp.2d 18 (D.D.C. 2001) 3

Tulare County v. Bush, 306 F.3d 1138 (D.C. Cir. 2002) 3, 5, 6, 7

Tulare County v. Bush, 317 F.3d 227 (D.C. Cir. 2003) 3, 7

STATUTES AND RULES

Antiquities Act, 16 U.S.C. §431(2) ..... *passim*

Federal Rules Of Civil Procedure Rule 8(a) 3, 4

Supreme Court Rule 10 ..... 3, 4

Supreme Court Rule 15.1 2

OTHER AUTHORITIES

Presidential Proclamation 7295, "Establishment of the Giant Sequoia National Monument," 65 Fed. Reg. 24095 (April 15, 2000) ..... *passim*

STATEMENT OF THE CASE

Petitioners ("Tulare County") ask this Court to review and reinstate their lawsuit seeking invalidation of Giant Sequoia National Monument (the "Monument"). The Monument was created by Presidential Proclamation 7295 (April 15, 2000) (the "Proclamation") to protect natural and man-made objects of scientific and historic interest situated on approximately 328,000 acres of federal land in the mountains of central California. *See generally* Appendix ("App.") to Tulare County's Petition for a Writ of Certiorari ("Pet.") at 35-44. While the Monument was named for the giant sequoia groves it encompasses, it protects numerous other resources as well, within a "rich and varied landscape." App. 35. The Proclamation describes, among other protected objects: "a great belt of coniferous forest, jeweled with mountain meadows," "[b]old granitic domes, spires, and plunging gorges," "an extraordinary number of habitats within a relatively small area," "a diverse array of plants and animals, many of which are rare or endemic," "limestone caverns," "unique paleontological resources," "many archeological sites," and "historic remnants of early Euroamerican settlement." *Id.* The Proclamation goes on to detail many of these features and discuss their scientific and historic interest. *Id.* at 36-39. The precise extent of those features that the President deemed worthy of inclusion within a national monument is fixed by a map referenced and incorporated in the Proclamation. App. 40.

As relevant here, Tulare County sued on several claims dependent on the novel theory that, apart from the giant sequoia groves, the objects designated by the Proclamation are too amorphous to qualify for protection under the Antiquities Act. Most of the objects, in Tulare County's

view, are referenced in too "vague and generalized" a fashion, App. 47 (¶2), and not identified specifically enough by "physical description and geographic location," App. 79 (¶134). Thus the land protecting these objects, as opposed to those Tulare County conceives of as "valid" or "genuine," App. 81 (¶148) and 82 (¶149), *i.e.*, the giant sequoia groves, App. 47 (¶2) and Pet. at 14, was improperly included in the Monument.

Tulare County's complaint also asserts that national monument status actually threatens the designated objects by hampering management in a way petitioners allege increases the risk of fire. The Proclamation explicitly considered this issue and provided management flexibility to respond to it in several ways. *See* App. 36-37 (acknowledging a pre-existing hazard of wildfires); *id.* at 41-42 (permitting removal of trees "if clearly needed for ecological restoration and maintenance of public safety" and allowing construction of new roads and trails "to further the purposes of the monument," while mandating development of regulations and a management plan to protect the Monument, the latter with guidance from a Scientific Advisory Board appointed in consultation with the National Academy of Sciences). Nonetheless Tulare County asked that the Proclamation be found in violation of the Antiquities Act for jeopardizing included objects.[1] App. 84 (¶160).

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[1] In accordance with SUP.CT.R. 15.1, respondents note their disagreement with how Tulare County's petition characterizes its complaint and the Proclamation on the restrictiveness of the Proclamation and the risk of fire. *See* Pet. 6-8, 17. These documents are included in petitioners' Appendix and speak best for themselves. Respondents

(Continued on following page)

The District Court disposed of all Tulare County's claims on the pleadings. *Tulare County v. Bush*, 185 F.Supp.2d 18, 29-30 (D.D.C. 2001). On appeal, a unanimous Court of Appeals affirmed on all counts. *Tulare County v. Bush*, 306 F.3d 1138, 1144 (D.C. Cir. 2002). Tulare County petitioned for rehearing en banc, arguing that the appeals panel had applied too high a standard of pleading. *Tulare County v. Bush*, 317 F.3d 227, 227 (D.C. Cir. 2003). No member of the District of Columbia Circuit requested a vote on rehearing, and the panel wrote specially to clarify that it "examined the complaint against a no more rigorous standard of pleading than that of FED.R.CIV.P. 8(a)." *Id.*

ARGUMENT

Tulare County has identified no "compelling reason" (SUP.CT.R. 10) why the Court should grant certiorari. For each count of the Complaint, the Court of Appeals identified a fatal flaw in petitioners' legal theory. Thus, every count is governed by the well-established rule that dismissal on the pleadings is appropriate if "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The District Court was therefore correct in dismissing the complaint, and the appeals court was correct in affirming dismissal. While Tulare County plainly

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also object to Tulare County's unfounded request that this Court take judicial notice of their characterization of the McNally fire. *Id.* at 8.

disagrees with the legal conclusions of the courts below, that disagreement does not justify Supreme Court review.

Tulare County fails to bring its case within SUP.CT.R. 10's articulated reasons for a grant of certiorari by asserting that the Court of Appeals applied a heightened pleading standard to its complaint, ostensibly in contravention of F.R.CIV.P. 8(a) and this Court's prior decisions. *See* Pet. at 19. Because the Court of Appeals found Tulare County's complaint deficient as a matter of law, the allegation that the Court of Appeals *sub silentio* required an illicit level of factual specificity is as immaterial as it is wrong. When Tulare County raised this argument on petition for rehearing, the appeals court affirmed that "no more rigorous a standard of pleading than that of FED.R.CIV.P. 8(a)" was called for in such cases.[2] App. 34. Petitioners' rationale thus founders on this Court's admonition that "certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." SUP.CT.R. 10. Because the petition identifies neither an actual conflict with the decisions of this Court or of another appellate court, nor any important question of federal law that this Court should settle, it should be summarily denied.

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[2] The Court of Appeals originally articulated this standard, citing *Conley v. Gibson*, 355 U.S. at 45-46, in its opinion in the companion case to this one, *Mountain States Legal Foundation v. George Bush*, 306 F.3d 1132, 1134 (D.C. Cir. 2002), decided the same day.

I. Dismissal of Counts I Through IV Did Not Hinge On a Heightened Standard of Factual Pleading and Presents No Issue Meriting Supreme Court Review.

A. Count I Fails as a Matter of Law.

The Court of Appeals correctly found Count I insufficient as a matter of law. The court, with great accuracy, characterized Count I as "premised on the assumption that the Antiquities Act requires the President to include a certain level of detail in the Proclamation." *Tulare County v. Bush*, 306 F.3d at 1141. The operative paragraph of Tulare County's complaint asserts that petitioners are "entitled to judgment . . . because the objects of historic and scientific interest . . . have not been identified with reasonable specificity." App. 80 (¶139); *see also id.* (¶138) (referring to "the specificity required by the Antiquities Act"). As the court succinctly noted: "[n]o such requirement exists." *Tulare County v. Bush*, 306 F.3d at 1141. No heightened pleading standard contributed in any way to this legal conclusion, and Tulare County has thus identified no conflict between this ruling and any decision of this Court or any other court of appeals.

B. Count II Fails as a Matter of Law.

For similar reasons the Court of Appeals properly found that Count II failed as a matter of law. The court, again quite accurately, described the complaint as alleging "that the President has designated nonqualifying objects for protection." *Id.* at 1141. For comparison, the Complaint asserts that the "Proclamation purports to designate landscapes, scenic areas, ecosystems and other amorphous and imprecise items . . . . These items do not meet the

minimum qualifications for objects to be protected by a proclamation issued under the Antiquities Act." App. 80-81 (¶143). The Court of Appeals easily and correctly rejected this legal theory and, with it, any need for factual development: "[i]nclusion of such items as ecosystems and vistas in the Proclamation did not contravene the terms of the statute." *Tulare County v. Bush*, 306 F.3d at 1142. (noting that this Court had rejected a similar argument in *Cappaert v. United States*, 426 U.S. 128 (1976)). Again, the complaint's fatal defect was not a function of how detailed its factual allegations were or were not. The court rejected Tulare County's legal theory. And again, Tulare County points to no actual conflict between that ruling and another circuit's or this Court's decisions.

C. Count III Fails as a Matter of Law.

Count III depends on the same legal theory of the Antiquities Act as Count II, and fails as a matter of law for the same reason. Count III asserts that if one ignores the landscapes, scenic areas, and ecosystems that are described at length in the Proclamation, the Monument is then of greater size than necessary to protect the remaining objects, those that Tulare County sees as "valid." *See* App. 81 (¶148) ("[t]he Antiquities Act does not authorize the President to withdraw land parcels for inclusion in a Monument which are not necessary for the protection of *valid* objects") (emphasis added). Tulare County reiterates here that "at least 94% of the Monument area is not necessary to protect the only objects that can be identified and located from the Proclamation, *i.e.*, the mapped Giant Sequoia Groves." Pet. 14; *see also* App. 47 (¶2). This is not, as petitioners would have it, a factual assertion wrongly subjected to a heightened pleading standard. Rather, as

the Court of Appeals held, it "is a legal conclusion couched as a factual allegation," *Tulare County v. Bush*, 306 F.3d at 1142, about whether objects that are unequivocally described in the Proclamation qualify for protection under the Antiquities Act.

To survive judgment on the pleadings, Tulare County would have had to assert more than that not all of the Monument area was unnecessary for protection of a subset of the objects the President designated. To create a legally sufficient claim independent of the failed Count II, Tulare County would have had to allege, as the court below correctly concluded in denying rehearing, that "some part of the Monument does not, in fact, contain natural resources that the President sought to protect." *Tulare County v. Bush*, 317 F.3d at 227. That petitioners did not assert, and could not have, since no dispute was raised, or exists, that the landscapes, scenic areas, and ecosystems described in the Proclamation collectively are co-extensive with the Monument.[3]

D. Count IV Fails as a Matter of Law.

Count IV also fails, not because of lack of detail in its factual allegations, but because no proof of facts would entitle Tulare County to relief under the articulated legal

[3] No factual challenge was available on the issue of whether the scientific or historic value of the objects was great enough to merit protection in a national monument, since that is a decision the Antiquities Act squarely entrusts to presidential discretion. *See* 16 U.S.C. §431(2) ("The President of the United States is authorized, in his discretion, to declare by public proclamation . . . objects of historic or scientific interest").

theory. Count IV asks the judiciary to undertake a role it cannot properly fulfill. Tulare County alleges that "the Proclamation fails to protect any purported Monument objects and in fact renders their harm and destruction more likely." App. 84 (¶160). Notably, the Antiquities Act contains no explicit requirement or standards for management provisions. At all events, as noted above, the Proclamation directly considers the issue raised by Tulare County, and provides for it. *See, e.g., id.* at 36-37 (noting the "hazard of wildfires"); and 41-42 (permitting logging "if clearly needed for ecological restoration and maintenance of public safety" and allowing for new roads and trails "to further the purposes of the monument"). By seeking review of these provisions, Tulare County asks that a court substitute its judgment for the President's, with no standards to guide it. This the courts below properly declined to do. *Cf. Dalton v. Specter*, 511 U.S. 462, 476 (1994) ("[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for our review").

II. Count V Provides No Occasion for Review By This Court.

Finally, the Court of Appeals correctly affirmed dismissal of Count V, which is, in effect, simply a constitutional gloss on Tulare County's core theory that the Antiquities Act authorizes protection only of certain discrete physical objects with inarguable boundaries. Tulare County claims that if the Antiquities Act does not make designation of such objects illegal, then it is unconstitutional. *See* App. 85 (¶166) ("[i]f . . . President Clinton is authorized under the Antiquities Act to issue the Proclamation . . . for the purpose of protecting undefined, vague and amorphous entities . . . then in this instance Congress has

ceded its Constitutional power . . ."). However, petitioners point to no decision of another appellate court or of this Court with which the Court of Appeals' rejection of this theory conflicts. Nor do they identify any other reason for this Court to review the eminently sensible conclusion that the Antiquities Act does contain intelligible principles to guide presidential discretion, notwithstanding that it does not contain the peculiar standards Tulare County ascribed to it.

CONCLUSION

Wherefore, respondents the Natural Resources Defense Council, the Sierra Club, The Wilderness Society, and the Tule River Conservancy respectfully request that the Petition for a Writ of Certiorari in this matter be denied.

Respectfully submitted,

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Dated: June 9, 2003

(3)

JUL 8 - 2003

No. 02-1623

In the Supreme Court of the United States

TULARE COUNTY, CALIFORNIA, ET AL., PETITIONERS

v.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In the year 2000, the President issued a proclamation creating the Giant Sequoia National Monument. The President acted pursuant to the Antiquities Act of 1906 (Antiquities Act), which authorizes the President, "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" situated upon federal land "to be national monuments." 16 U.S.C. 431. The questions presented are as follows:

1. Whether the district court correctly dismissed petitioners' claims that the Presidential proclamation did not comply with the standards set forth in the Antiquities Act.

2. Whether the Antiquities Act is a valid statutory grant of authority to the President.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Cameron v. *United States*, 252 U.S. 450 (1920)	7
Cappaert v. *United States*, 426 U.S. 128 (1976)	7
Dalton v. *Specter*, 511 U.S. 462 (1994)	9
Department of State v. *Ray*, 502 U.S. 164 (1991)	11
Franklin v. *Massachusetts*, 505 U.S. 788 (1992)	9
Mountain States Legal Found. v. *Bush*, 306 F.3d 1132 (D.C. Cir. 2002), petition for cert. pending, No. 02-1590 (filed Apr. 30, 2003)	5, 6
United States v. *George S. Bush & Co.*, 310 U.S. 371 (1940)	10
United States v. *Mitchell*, 445 U.S. 535 (1980)	9

Constitution, statutes, and rule:

U.S. Const. Art. IV, § 3, Cl. 2 (Property Clause)	4
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*	6, 11
5 U.S.C. 701(a)	11
Antiquities Act of 1906, 16 U.S.C. 431 *et seq.*	2, 4, 9
Fed. R. Civ. P. 8(a)	6

In the Supreme Court of the United States

No. 02-1623

TULARE COUNTY, CALIFORNIA, ET AL., PETITIONERS

v.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 306 F.3d 1138. The statement (Pet. App. 33-34) issued by the panel upon denial of rehearing en banc is reported at 317 F.3d 227.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2002. A petition for rehearing was denied on February 4, 2003 (Pet. App. 33). The petition for a writ of certiorari was filed on May 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Antiquities Act of 1906 (Antiquities Act or Act), 16 U.S.C. 431 *et seq.*, confers authority upon the President to set aside federal lands to be managed as national monuments. The Act provides:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

16 U.S.C. 431. The Antiquities Act contains no provision for judicial review.

2. On April 15, 2000, President Clinton issued a proclamation establishing the Giant Sequoia National Monument in south-central California. Pet. App. 35-44. The President established the Monument, which comprises 327,769 acres located within the Sequoia National Forest, in order to protect a variety of objects of historic and scientific interest, including groves of towering giant sequoias, geologic and volcanic features, rare and endemic plant and animal species, archaeological sites, and historic remnants of early Euroamerican settlement and the exploitation of the giant sequoias. *Id.* at 35-40. Creation of the Monument, the proclamation stated, would "provide[] exemplary opportunities for biologists, geologists, paleontologists, archaeologists, and historians to study these objects." *Id.* at 35. The President invoked the Antiquities Act as the

source of his authority to issue the proclamation. *Id.* at 39. The proclamation specifically stated that the land set aside "is the smallest area compatible with the proper care and management of the objects to be protected." *Id.* at 40.

3. Petitioners filed suit in federal district court, challenging the Presidential proclamation that established the Giant Sequoia National Monument. See Pet. App. 45-96 (complaint). Petitioners contended, *inter alia*, that the proclamation violated the Antiquities Act because it failed to identify with sufficient precision the objects to be protected (Count 1); designated natural features, such as ecosystems, that allegedly do not qualify for protection under the Act (Count 2); failed to ensure that the size of the Monument was limited to the smallest area compatible with the proper care and management of the objects to be protected (Count 3); and increased the likelihood of harm due to fire by prohibiting commercial timber harvesting and by limiting road construction (Count 4). See *id.* at 78-84, 93-94. In Count 5, petitioners further alleged that, if the Antiquities Act authorizes the President to issue the proclamation in question, the Act effects an unconstitutional delegation of legislative power. See *id.* at 84-85, 94.

The district court dismissed the complaint in its entirety. Pet. App. 11-32. With respect to Counts 1-4 of petitioners' complaint, the court explained:

> While this court can evaluate whether President Clinton exercised his discretion in accordance with the standards of the Antiquities Act, this court cannot review the President's determinations and factual findings, as [petitioners] suggest. To do so would invade the legislative and executive domains

> because Congress has directed that the President, "in his discretion," make these findings. Accordingly, this court limits its examination to the face of the Proclamation.

Id. at 20. The court found that the proclamation on its face complies with the standards set forth in the Antiquities Act and that Counts 1-4 of petitioners' complaint should therefore be dismissed. *Id.* at 21. The court also dismissed Count 5, holding that the Antiquities Act contains meaningful standards and limitations to cabin the President's discretion and therefore represents a permissible grant of authority under the Property Clause of the Constitution, Art. IV, § 3, Cl. 2. See Pet. App. 21-23.

4. The court of appeals affirmed. Pet. App. 1-10. The court held that the Antiquities Act does not require the President to identify a precise location for each item of scientific or historic interest within a designated monument, and that Count 1 of petitioners' complaint therefore failed as a matter of law. *Id.* at 5. The court held that Count 2 failed as a matter of law as well because "such items as ecosystems and scenic vistas" are permissible objects of protection under the terms of the Antiquities Act. *Id.* at 6.

The court of appeals likewise affirmed the dismissal of Counts 3 and 4 of petitioners' complaint, concluding that petitioners had failed to allege facts sufficient to state a claim. Pet. App. 6-8. With respect to Count 3, the court found that petitioners' core allegation—*i.e.*, that the President had failed to ensure that the designated tract "is the smallest area compatible with the proper care and management of the objects to be protected," as required by 16 U.S.C. 431—"is a legal conclusion couched as a factual allegation." Pet. App. 6.

The court explained that petitioners' complaint "fails to identify the improperly designated lands with sufficient particularity to state a claim," and therefore "does not make the factual allegations sufficient to support its claims." *Id.* at 7. "This is particularly so," the court stated, because petitioners' "claim that the Proclamation covered too much land is dependent on the proposition that parts of the Monument lack scientific or historical value, an issue on which [petitioners] made no factual allegations." *Ibid.* The court similarly held that Count 4 was subject to dismissal because it "contains no factual allegations" to support its conclusory assertion that the risk of wildfires has increased under the current management regime. See *id.* at 7-8. With respect to Count 5, the court held that petitioners' constitutional non-delegation claim failed as a matter of law because the Antiquities Act "includes intelligible principles to guide the President's action." *Id.* at 8 (quoting *Mountain States Legal Found.* v. *Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002), petition for cert. pending, No. 02-1590 (filed Apr. 30, 2003)).

The court of appeals subsequently denied petitioners' petition for rehearing en banc. Pet. App. 33. At that time, the panel that had ruled on petitioners' appeal issued the following statement:

> Contrary to [petitioners'] argument, the court examined the complaint against a no more rigorous standard of pleading than that of Fed.R.Civ.P. 8(a). The court affirmed the district court's dismissal, for example, of Count III of the complaint because it contained no factual allegations that any part of the Monument lacked scientific or historical value. The allegation that Sequoia groves comprise only six percent of the Monument might well have been

> sufficient if the President had identified only Sequoia groves for protection, but he did not; the Proclamation covered natural resources present throughout the Monument area. It was therefore incumbent upon [petitioners] to allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect. That, and nothing more, is what led the court to conclude that the complaint did not identify improperly designated lands "with sufficient particularity."

Id. at 34.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Contrary to petitioners' contention (*e.g.*, Pet. 10-11), the court of appeals did not impose "heightened pleading standards" requiring more specific factual averments than are required by Federal Rule of Civil Procedure 8(a). Further review is not warranted.*

---

* Petitioners' complaint named as defendants, *inter alia*, the President of the United States in his official capacity. See Pet. App. 45-46. This Court's decisions strongly indicate that courts lack authority to award declaratory or injunctive relief against the President. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 825-829 (1992) (Scalia, J., concurring in part and concurring in the judgment). In any event, the President is not an "agency" subject to suit under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), see *Franklin*, 505 U.S. at 800-801 (opinion of the Court); the Antiquities Act contains no judicial review provision; and petitioners identify no other provision of law that purports to authorize the filing of a suit against the President under the circumstances presented here. In addition to the President, however, petitioners in this case, unlike the petitioners in *Mountain States Legal Foundation* v. *Bush*, *supra*, have named as defendants the federal

1. The court of appeals affirmed the dismissal of Counts 1 and 2 of petitioners' complaint on purely legal grounds. Count 1 of the complaint alleged that the Presidential proclamation violated the Antiquities Act because the proclamation itself did not identify "by physical description and geographic location" the objects of historic and scientific interest to be protected. Pet. App. 79. The court of appeals held that "[n]o such requirement exists" under the Antiquities Act. *Id.* at 5. The court explained that "[b]y identifying historic sites and objects of scientific interest located within the designated lands, the Proclamation adverts to the statutory standard. Hence, Count 1 fails as a matter of law." *Ibid.*

Count 2 of petitioners' complaint likewise failed as a purely legal matter. Count 2 alleged that the proclamation was invalid because it designated for protection "[l]andscapes, scenic areas, ecosystems and other amorphous and imprecise items." Pet. App. 80. The court of appeals held that inclusion of such items did not contravene the terms of the statute. *Id.* at 6. The court noted that in *Cappaert* v. *United States*, 426 U.S. 128, 141-142 (1976), this Court held that "the President's Antiquities Act authority is not limited to protecting only archeological sites." Pet. App. 6; see also *Cameron* v. *United States*, 252 U.S. 450, 455-456 (1920) (sustaining designation of Grand Canyon as national monument under Antiquities Act).

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agencies and subordinate Executive Branch officials charged with managing the public lands in question. See Pet. App. 45-46. The unavailability of judicial process to compel or prohibit the President's performance of an official act therefore does not provide an independent ground for dismissal of petitioners' suit or for denial of certiorari.

Because Counts 1 and 2 of petitioners' complaint call into question the facial validity of the Presidential proclamation, the court of appeals correctly held that development of a factual record was unnecessary to resolve those claims. Petitioners identify no judicial decision supporting their contentions in Counts 1 and 2 that the proclamation on its face was inconsistent with the terms of the Antiquities Act. The court of appeals' disposition of those counts therefore presents no issue warranting this Court's review.

2. In affirming the district court's dismissal of Counts 3 and 4, the court of appeals relied on the conclusory nature of petitioners' allegations, and it left open the possibility that those counts might have survived a motion to dismiss if the complaint had contained more specific factual allegations. See Pet. App. 6-8. In its statement issued upon denial of rehearing en banc, however, the court specifically disclaimed any intent to impose a heightened pleading requirement. See *id.* at 34. Petitioners do not contend that the court of appeals announced any rule of law governing the pleading of federal claims, either under the Antiquities Act or more generally, that can be expected to affect the disposition of future cases. Petitioners' contention that the court misapplied established pleading rules to the facts of this case presents no issue of recurring importance warranting this Court's review.

In any event, Counts 3 and 4 of petitioners' complaint are subject to dismissal on the independent ground that the claims raised therein are not judicially reviewable. See Pet. App. 20 (district court states that a Presidential proclamation issued pursuant to the Antiquities Act is reviewable for facial compliance with the Act, but that a court "cannot review the President's determinations and factual findings"). Counts 3 and 4 of peti-

tioners' complaint allege that (a) the President failed to ensure that the size of the Monument is "confined to the smallest area compatible with the proper care and management of the objects to be protected," as required by 16 U.S.C. 431, and (b) the proclamation increases the risk of harm through wildfire to objects within the designated area. See Pet. App. 81-84, 94. The proclamation itself specifically states, however, that the tract reserved for the Giant Sequoia National Monument "is the smallest area compatible with the proper care and management of the objects to be protected." *Id.* at 40. And, as the court of appeals recognized, "the Proclamation expressly addresses the threat of wildfires and the need for forest restoration and protection." *Id.* at 7; see *id.* at 36-37. Counts 3 and 4 of petitioners' complaint thus allege in substance that the President abused the discretion conferred on him by the Antiquities Act in assessing the environmental and other factors bearing on the propriety of the Monument designation.

Even as a general matter, waivers of sovereign immunity must be express, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), and there is no waiver of sovereign immunity for the abuse-of-discretion claim advanced by petitioners here. But in addition, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," this Court "would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992); accord *Dalton* v. *Specter*, 511 U.S. 462, 474 (1994) ("[W]here a claim concerns not a want of Presidential power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it

involves considerations which are beyond the reach of judicial power.") (brackets and internal quotation marks omitted); *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (application by the President of a statutory standard to a particular set of facts "is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment."). Neither the Antiquities Act nor any other federal statute authorizes abuse-of-discretion review of the President's designation of national monuments under the Act. Petitioners' abuse-of-discretion claims therefore would not be justiciable even if they had been pleaded in an adequate manner.

3. Count 5 of petitioners' complaint alleged that, if the proclamation establishing the Giant Sequoia National Monument is authorized by the Antiquities Act, the Act effects an unconstitutional delegation of legislative power. See Pet. App. 84-85, 94. The court of appeals correctly affirmed the district court's dismissal of that claim, holding that the Act contains "intelligible principles" that circumscribe the President's discretion. *Id.* at 8. Although petitioners challenge that holding (see Pet. 22), they identify no judicial decision that has held this or any comparable federal statute to be an unconstitutional delegation of legislative power.

Petitioners also contend (Pet. 22) that, if the dismissal of Counts 1-4 of their complaint is sustained, then "the President's actions are in no way restrained by the intelligible principles set forth in the Act because they are not subject to any meaningful judicial review." That claim lacks merit. The courts below reviewed, and rejected on the merits, petitioners' claims that the challenged proclamation was facially inconsistent with the standards set forth in the Antiquities Act. Because Presidential actions are entitled to a

strong presumption of regularity, cf. *Department of State* v. *Ray*, 502 U.S. 164, 179 (1991) (courts "generally accord Government records and official conduct a presumption of legitimacy"), the proclamation must be assumed to reflect a good-faith determination by the President that the Antiquities Act standards are satisfied. The statutory criteria thus meaningfully constrain the President's authority, even though the President's factual determinations are not subject to judicial review. And the established principle that Presidential action is presumptively unreviewable for abuse of discretion would be wholly subverted if the absence of such review rendered the governing statute an unconstitutional delegation of legislative power. Indeed, the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) provides that even ordinary agency action is not subject to judicial review to the extent a statute precludes review or the matter is committed to agency discretion by law, see 5 U.S.C. 701(a), and the absence of judicial review in those circumstances has never been thought to raise the sort of unconstitutional delegation question that petitioners assert here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

TULARE COUNTY, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*, NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, PEOPLE OF THE STATE OF CALIFORNIA. *ex rel.* BILL LOCKYER, ATTORNEY GENERAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTION PRESENTED

Did the Court of Appeals for the District of Columbia Circuit act properly when it explicitly applied the usual pleading standards of Federal Rules of Civil Procedure 8(a) and 12(b)(6) to affirm dismissal of a complaint, where the complaint's allegations that the President exceeded his very broad discretion to establish a national monument under the Antiquities Act failed to state a claim upon which relief could be granted?

Table of Contents

Question Presented i

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The Proclamation 2

B. The Complaint 3

C. Opinions Below 4

REASONS FOR DENYING THE PETITION 6

I. Certiorari Is Not Warranted Because, in Affirming Dismissal of the Complaint, the Court of Appeals Explicitly Stated That it Followed Rules 8(a) and 12(b)(6), and Did Not Apply a "Heightened Pleading Standard," as Alleged By Petitioners 6

A. Certiorari is Not Warranted Because the Court of Appeals Properly Selected the Pleading Standard Set Forth in Rule 8(a) 67

Table of Contents (Cont.)

B. Having Correctly Chosen the Usual Pleading Standard of Rule 8(a), the Court of Appeals Properly Applied That Standard in Concluding That Petitioners' Complaint Does Not Entitle Them To Relief 7

C. Because the Court of Appeals Applied the Correct Pleading Standard Under Rules 8(a) and 12(b)(6), Cases Cited By Petitioner, Where This Court Struck Down a Lower Court's Adoption of a "Heightened Pleading Standard," Are Irrelevant 12

D. A Mere Claim of Error Does Not Justify Invocation of This Court's Review 15

CONCLUSION 17

Table of Authorities

Federal Cases

Anaconda Copper Co. v. Andrus
14 Env't Rep. Cas. (BNA)
1853 (D. Alaska 1980) 9, 12

Cameron v. United States
252 U.S. 450 (1920) 5, 8, 9, 11

Cappaert v. United States
426 U.S. 128 (1976) 5, 8, 9, 11

Crawford-El v. Britton
523 U.S. 574 (1998) 12-14

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit
507 U.S. 163 (1993) 12-14

Mountain States Legal Found. v. Bush
306 F.3d 1132 (D.C. Cir. 2002) 6

Ross v. Moffitt
417 U.S. 600 (1974) 15

Swierkiewicz v. Sorema N.A.
534 U.S. 506 (2002) 12-14

Table of Authorities (Cont.)

Ticor Title Ins. Co. v. Brown
511 U.S. 117 (1994) 15

Tulare County v. Bush
185 F.Supp.2d 18 (D.D.C. 2001) 4

Tulare County v. Bush
306 F.3d 1138 (D.C. Cir. 2002) 4

Tulare County v. Bush
317 F.3d 227 (D.C. Cir. 2003) 4

United States v. California
436 U.S. 32 (1978) 11

Whitman v. Am. Trucking Ass'ns, Inc.
531 U.S. 457 (2001) 6, 11

Wyoming v. Franke
58 F.Supp. 890 (D. Wyo. 1945) 11

Table of Authorities (Cont.)

Federal Statutes

Antiquities Act of 1906
16 U.S.C. § 431 ..... *passim*

Federal Register

65 Fed.Reg. 24,095 (April 15, 2000) 2

Federal Rules of Civil Procedure

Rule 8(a) ..... *passim*
Rule 9(b) 13
Rule 12(b)(6) ..... *passim*

Supreme Court Rules

Supreme Court Rule 10 15
Supreme Court Rule 10(a) 15

INTRODUCTION

In the nearly 100-year history of the Antiquities Act, no court has ever struck down a national monument created under the Act. Following this well-established body of law, the Court of Appeals for the District of Columbia Circuit correctly reached the conclusion that petitioners' complaint fails to allege facts sufficient to demonstrate that the President overstepped the bounds of his authority under the Antiquities Act in creating the Giant Sequoia National Monument. As every court that has considered the issue has ruled, judicial review of a presidential proclamation creating a national monument is limited to determining whether the President acted within his authority under the Act, and does not encompass evaluation of the manner in which the President exercised his discretion. There is no unresolved question of law at issue in this case.

Lacking any basis in the substantive law, petitioners attempt to make an issue of pleading requirements by attributing the use of the "heightened pleading" standard to the District of Columbia Circuit. On the contrary, the Court of Appeals expressly stated that it did not apply a "heightened pleading standard." Rather, the Court of Appeals applied the usual and unremarkable standards found in Federal Rules of Civil Procedure 8(a) and 12(b)(6) to find, correctly, that the complaint did not state any facts that would entitle petitioners to relief. The petition thus raises no issues appropriate for certiorari, and should be denied.

STATEMENT OF THE CASE

A. The Proclamation

On April 15, 2000, the President issued a Proclamation creating the Giant Sequoia National Monument in the central Sierra Nevada region of California, pursuant to the discretion conferred on him by the Antiquities Act of 1906, 16 U.S.C. § 431. The Proclamation identifies numerous objects of scientific and historic value for protection within approximately 327,769 acres of federal lands. Such objects include some of the last remaining groves of ancient giant sequoias – the world's largest and among its longest-lived trees – and the surrounding ecosystems necessary to their survival, as well as paleontological resources documenting tens of thousands of years of ecosystem change, fossilized evidence of Pleistocene Era giant sequoia growth, unique geologic and volcanic formations such as granitic domes, spires and gorges, Native American archeological sites, remnants of early Euroamerican settlement, and rare and endemic plant and animal species. Proclamation No. 7295, 65 Fed.Reg. 24,095 (April 15, 2000), reprinted in Petitioners' Appendix ("Pet. App.") 35-40. The Proclamation states that it encompasses "the smallest area compatible with the proper care and management of the objects to be protected as identified in the [Proclamation]." Pet. App. 40.

The Proclamation provides that "[n]o portion of the monument shall be considered to be suited for timber production, and no part . . . shall be used in a calculation or provision of a sustained yield of timber from the Sequoia National Forest." Pet. App. 41. The Proclamation

provides that "establishment of this monument is subject to valid existing rights," including completion of timber sales under contract, and that tree removal may take place "if clearly needed for ecological restoration and maintenance or public safety." *Id.* The Proclamation forbids the building of new roads within the monument, "except to further the purposes of the monument." Pet. App. 42.

B. The Complaint

Tulare County and others ("petitioners" or "plaintiffs") sued, alleging that the President did not "reasonably identif[y] all the objects of historic or scientific interest which are necessary to justify the 327,769 acre Monument . . . with the specificity required by the Antiquities Act." Complaint, ¶¶ 136-138, Pet. App. 79-80 (Count I). The complaint also alleges that the Proclamation impermissibly protects landscapes, scenic areas, ecosystems and "amorphous and imprecise items" as objects of historic or scientific interest under the Act. Pet. App. 80-81 (Count II).

Relying on their claims that the Proclamation lacks detail and that landscapes, scenic areas, natural phenomena and ecosystems do not qualify for protection under the Act, plaintiffs further claim that the President designated "a grossly oversized Monument unnecessary for the protection of any objects of genuine historic or scientific interest." Pet. App. 82 (Count III); *see* Petition ("Pet.") 14. Count IV alleges that the Proclamation harms, rather than protects, any such objects by increasing the likelihood of wildfire. Pet. App. 83-84. Count V alleges that if the Proclamation is within the President's authority

under the Antiquities Act, then the Act is an unconstitutional delegation of Congressional power because it lacks "meaningful limitation." Pet. App. 84-85.[1/]

C. Opinions Below

The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim for which relief may be granted. *Tulare County v. Bush*, 185 F.Supp.2d 18, 29-30 (D.D.C. 2001), reprinted at Pet. App. 11. The Court of Appeals affirmed, holding that because the Antiquities Act allows the President, "in his discretion," to declare "objects of historic or scientific interest . . . to be national monuments," judicial review is not available to evaluate the President's exercise of discretion, but only to determine whether he acted *ultra vires* his authority under the Act. *Tulare County v. Bush*, 306 F.3d 1138, 1141-44 (D.C. Cir. 2002), reprinted at Pet. App. 1, 4-9.

Plaintiffs sought rehearing en banc, arguing that the panel applied a "heightened standard" in affirming dismissal of the complaint. No member of the District of Columbia Circuit requested a vote on rehearing, and the panel issued a Statement clarifying that it had "examined the complaint against a no more rigorous standard of pleading than that of Fed.R.Civ.P. 8(a)." *Tulare County v. Bush*, 317 F.3d 227 (D.C. Cir. 2003) (denying rehearing en banc), reprinted at Pet. App. 34.

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1. The remaining claims are not encompassed within the questions presented in the petition for certiorari.

The Court of Appeals held that Counts I-IV do not contain allegations that, if proven, demonstrate that the President acted outside his authority under the Antiquities Act: Count I seeks descriptive detail that the Act does not require, thus failing as a matter of law to state a claim for relief (Pet. App. 5); Count II fails because the Proclamation's designation of landscapes, ecosystems, and other natural and man-made objects as objects of historic or scientific interest under the Act is consistent with Supreme Court precedent. Pet. App. 6. *See Cappaert v. United States*, 426 U.S. 128, 141-42 (1976); *Cameron v. United States*, 252 U.S. 450, 456 (1920).

The Court of Appeals rejected Counts III and IV as conclusory and without factual foundation. Pet. App. 6-8. The court noted that the complaint fails to allege that any part of the Monument lacks historic or scientific objects, or is not necessary for the protection of such objects. Pet. App. 7; *see also* Pet. App. 34. Rather, the sole premise underlying Count III is that, of the many historic and scientific objects identified for protection, only the sequoia groves (allegedly comprising just 6% of the monument area) qualify for protection. *See* Pet. 14. But the Court of Appeals, in disapproving Count II, rejected this premise as a matter of law. Pet. App. 7. Regarding Count IV, the Proclamation observes that "'a century of fire suppression and logging'" has created increased fire hazards, and specifically provides for management of these threats. Pet. App. 7-8. The court noted that the complaint contains no allegations that this provision fails to protect objects of scientific or historic value identified in the Proclamation, and thus does not state a claim for relief. Pet. App. 8.

Finally, the Court of Appeals applied this Court's non-delegation framework to assess whether the Antiquities Act is an unconstitutional delegation of Congressional power to the President, *see, e.g., Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001), and concluded that the "statute includes intelligible principles to guide the President's action." Pet. App. 8; *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002). It therefore rejected petitioners' constitutional claim.

REASONS FOR DENYING THE PETITION

I. Certiorari Is Not Warranted Because, in Affirming Dismissal of the Complaint, the Court of Appeals Explicitly Stated That it Followed Rules 8(a) and 12(b)(6), and Did Not Apply a "Heightened Pleading Standard," as Alleged By Petitioners

The petition rests entirely on the suggestion that the District of Columbia Circuit applied a "heightened pleading standard" in affirming dismissal of the complaint. The Court of Appeals, however, specified that it did not subject the complaint to a heightened pleading standard (Pet. App. 34), and examination of the Court's opinions confirms that it did not do so. Rather, the Court held that petitioners failed to allege any facts (as opposed to conclusory statements) that, if proven, would demonstrate that the Proclamation exceeds the President's broad discretion to establish a national monument under the Antiquities Act. Since the complaint lacks allegations sufficient to entitle petitioners to relief, the Court of

Appeals affirmed dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). Pet. App. 2.

A. Certiorari is Not Warranted Because the Court of Appeals Properly Selected the Pleading Standard Set Forth in Rule 8(a)

As the Court of Appeals itself stated, the court "examined the complaint against a no more rigorous standard of pleading than that of Fed.R.Civ.P. 8(a)." Pet. App. 34. In so doing, the court determined that plaintiffs had failed to allege that any part of the monument is devoid of "objects of historic or scientific interest" (16 U.S.C. § 431) that the President sought to protect. Pet. App. 34.

Petitioners would have this Court believe that the Court of Appeals – despite its statement to the contrary – actually applied a "heightened pleading standard" to affirm dismissal of their complaint. Petitioners are mistaken. Nothing in the decision below supports petitioners' suggestion that the Court of Appeals misrepresented the standard it applied. Rather, the discretion vested in the President under the Antiquities Act occasioned the demise of petitioners' complaint.

B. Having Correctly Chosen the Usual Pleading Standard of Rule 8(a), the Court of Appeals Properly Applied That Standard in Concluding That Petitioners' Complaint Does Not Entitle Them To Relief

The decision below affirming dismissal of the complaint for failure to state a claim upon which relief

may be granted is correct. The only way to obtain the relief petitioners seek is to show that the President acted outside the discretion vested in him by the Antiquities Act. The Court of Appeals properly held that each of petitioners' claims that the President did so fails as a matter of law. The allegations in their complaint thus do not entitle petitioners to any relief.

Count I was properly dismissed because petitioners' assertion[2/] that the Antiquities Act requires a greater level of "specificity" in identifying objects for protection than the Proclamation provides is incorrect. Pet. App. 5. The Act authorizes the President, "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments." 16 U.S.C. § 431. The Court of Appeals found that the Proclamation did so. Pet. App. 5. No greater pleading standard was applied than simple measurement of plaintiffs' assertions against the broad discretion vested in the President by the Act itself. *See Cameron*, 252 U.S. at 455-56.

Count II was properly dismissed because plaintiffs' assertion that the Antiquities Act does not permit designation of landscapes and ecosystems for protection is inconsistent with Supreme Court precedent. Pet. App. 6. *See Cappaert*, 426 U.S. at 141-42. Petitioners do not argue that this aspect of the Court of Appeals' holding is incorrect or inconsistent with Supreme Court precedent or

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2. *See* Complaint ¶¶ 136-139, Pet. App. 79-80).

with the holdings of any other court and, plainly, it is not. *See Cameron*, 252 U.S. at 455-56 (endorsing designation of entire Grand Canyon area as national monument); *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853, 1855 (D. Alaska 1980) (assessing proclamations creating national monuments on vast areas of federal land in Alaska "against the authority of the President as it has been recognized in *Cappaert* and in *Cameron*," and concluding that "matters of scientific interest which involve geological formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act.").

The Court of Appeals properly affirmed dismissal of Count III upon measurement of plaintiffs' allegations against the President's broad authority to establish national monuments. As the court explained, the premise of plaintiffs' claim[3/] that the Proclamation creates a "grossly oversized Monument" (Pet. App. 82, ¶ 150) – *i.e.*, that the giant sequoia groves, allegedly comprising just 6% of the Monument, are the only objects identified in the Proclamation that lawfully may be protected under the Act – is flawed as a matter of law. Pet. App. 7; Pet. App. 34. Plaintiffs did not allege that any part of the Monument lacks objects identified for protection in the Proclamation, or is unnecessary for their proper care and management. Pet. App. 34. Thus the court accurately determined that no set of facts consistent with plaintiffs' allegations could be proved that would entitle them to relief.

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3. *See* Pet. 14.

The Court of Appeals affirmed dismissal of Count IV because – contrary to the complaint's assertion that the Proclamation blindly increases the risk of "catastrophic fire" – the Proclamation expressly acknowledges and provides for management of the well-known and well-documented risks of wildfire. Pet. App. 7-8. The fact that it does not employ plaintiffs' preferred tool of commercial logging to achieve that aim does not support a claim that the President violated the Antiquities Act.

Finally, the Court of Appeals held that the Act "includes intelligible principles to guide the President's action," and thus does not run afoul of the non-delegation doctrine articulated by this Court. Pet. App. 8. The complaint simply lacks allegations that would prove the President acted outside those guidelines. Pet. App. 5-8.

Petitioners argue that the Antiquities Act is without meaningful limitation, and thus violates the non-delegation doctrine, if a court does not undertake to determine how many objects is too many to protect, how historic or how scientific the objects should be, how much protection they deserve, or how small an area is "the smallest" compatible with proper care and management of the objects. But this argument founders on this Court's admonition that, when Congress delegates its powers:

> [W]e have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." In *Touby* [*v. United States*], for example, we did not require the statute to decree how "imminent" was too imminent, or how "necessary" was necessary

> enough, or even – most relevant here – how "hazardous" was too hazardous. 500 U.S., at 165-67, 111 S.Ct. 1752 [(1991)]. . . . It is therefore not conclusive for delegation purposes that . . . the EPA [is permitted] to make judgments of degree.

Am. Trucking, 531 U.S. at 475. Judicial review is not available to petitioners because their allegations fail to make a legally cognizable claim that the President acted outside the bounds of his discretion in determining where and how he would create the Giant Sequoia National Monument.

Petitioners' complaint failed not because the Court of Appeals raised the bar, but because establishment of a national monument cannot be overturned on the allegations they put forth. In the nearly 100-year history of the Antiquities Act, no court has struck down a national monument created under the Act. *See Cameron*, 252 U.S. at 455-56 (upholding monument established to protect unique geology, scientific interest and public appeal of Grand Canyon); *Cappaert*, 426 U.S. at 141-42 (upholding monument created to protect unique pupfish species and hydrology of Devil's Hole); *United States v. California*, 436 U.S. 32, 36 (1978) (endorsing monument created to protect marine life, fossils and geology of Channel Islands); *Wyoming v. Franke*, 58 F.Supp. 890, 895 (D. Wyo. 1945) (upholding Jackson Hole National Monument, created to protect evidence of "the early fur industry of the West, structures of glacial formation and peculiar

mineral deposits and plant [and animal] life indigenous to the particular area"); *Anaconda*, 14 Env't Rep. Cas. at 1854-55 (upholding creation of monument to protect "matters of scientific interest which involve geological formations, or . . . plant, animal or fish life").

C. Because the Court of Appeals Applied the Correct Pleading Standard Under Rules 8(a) and 12(b)(6), Cases Cited By Petitioner, Where This Court Struck Down a Lower Court's Adoption of a "Heightened Pleading Standard," Are Irrelevant

In an effort to obtain certiorari, petitioners cite a series of cases where the Court of Appeals had deliberately adopted a "heightened pleading standard" for evaluation of a claim at the pleading stage.[4] Because the District of Columbia Circuit expressly applied the usual pleading standard under Federal Rules of Civil Procedure 8(a) and 12(b)(6), petitioners' citations and accompanying argument are irrelevant.

In each of the cases petitioners cite, the Court of Appeals concluded that a heightened pleading standard was required or appropriate to evaluate a particular type of

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4. Petitioners rely principally on *Crawford-El v. Britton*, 523 U.S. 574 (1998), *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Pet. 11, 18-22.

claim, and this Court ruled that the lower court had selected the wrong standard. In *Leatherman*, this Court struck down a heightened pleading rule fashioned by the Fifth Circuit for limiting cases that allege municipal liability. 507 U.S. at 164-69. Similarly, in *Crawford-El*, the Court struck down a heightened pleading standard adopted by the Court of Appeals to weed out improper motive cases against public officials that are "easy to allege but hard to disprove." 523 U.S. at 584-85. In *Swierkiewicz*, this Court dealt with the Second Circuit's requirement that employment discrimination plaintiffs must plead the elements of a *prima facie* case sufficient to raise an inference of discrimination in order to survive a motion to dismiss. 543 U.S. at 510. The Court held that this pleading standard impermissibly exceeds the requirements of Fed.R.Civ.P 8(a). 543 U.S. at 513-14.

The decision below in this case does not run afoul of any of the cited precedents because, as the Court of Appeals itself explained, "[c]ontrary to Tulare County's argument, the court examined the complaint against a no more rigorous standard of pleading than that of Fed.R.Civ.P. 8(a)." Pet. App. 34. Rather than conflicting with this Court's prior holdings, the decision below is consistent with the understanding that, except for claims specified in Fed.R.Civ.P. 9(b), the only pleading requirement under Rule 8(a) is a "short and plain statement" giving defendant fair notice of the claim and the grounds for relief sought. *Leatherman*, 507 U.S. at 168. The court simply assessed the complaint's factual assertions against the law framing each claim, and

determined, pursuant to Rule 12(b)(6), that they did not state a claim for which relief may be granted.

Petitioners' narrow focus on the notice pleading requirements of Rule 8(a) neglects to account for the effect of Rule 12(b)(6), which permits dismissal if the allegations in the complaint do not set forth any claim for which *relief may be granted.* Fed.R.Civ.P. 12(b)(6). The District of Columbia Circuit held that the complaint could not survive a motion to dismiss because the allegations, even if true, do not demonstrate that the President exceeded his authority under the Antiquities Act: the objects identified for protection and their description in the Proclamation are valid under the Act; the complaint does not allege that any part of the Monument lacks objects of historic and/or scientific interest; and the Proclamation on its face demonstrates that the Monument does not increase the risk of wildfire. Thus the complaint fails to state a claim for which relief is available.

In this case, no justification exists for correcting the approach of the court below in evaluating complaints at the pleading stage, as in *Leatherman*, *Crawford-El*, and *Swierkiewicz*. In those cases, the courts below mistakenly believed that application of a heightened pleading standard to the particular claims presented was appropriate. No such error occurred here. Rather, petitioners seek a judicial override of the President's judgment in creating the Giant Sequoia National Monument – a judgment that is well within the President's discretion under the Antiquities Act.

D. A Mere Claim of Error Does Not Justify Invocation of This Court's Review

At best, the petition claims that the court below erred in assessing the adequacy of the complaint's factual assertions in stating a claim for relief under the Act. A claim of error is not grounds for certiorari, however. Sup.Ct.R. 10. This Court is not another appellate forum for petitioners' claims, and alleged lower court errors are not the focus of this Court's jurisdiction. *Id.*; *see Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

This Court may grant certiorari where the court below "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup.Ct.R. 10(a). A petition is rarely granted, however, "when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup.Ct.R. 10. Nor does this Court typically grant certiorari merely for the purpose of correcting a perceived error in a Court of Appeals decision, or to achieve justice in a particular case. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994).

The District of Columbia Circuit clearly does not take issue with the applicability of Rule 8(a) to this type of case, and there is no reason to doubt the Court of Appeals' own assurances that it does not. The petition's repeated assertion that a different decision should have issued does not, alone, merit this Court's attention. The decision

below creates no conflict among the circuits, or with this Court's precedents. Nor did it decide an important question of federal law that requires this Court's elucidation for its effective administration. Petitioners present no reason, beyond their own desire to litigate this matter without filing an adequate complaint, for invoking the jurisdiction of the United States Supreme Court. The petition therefore should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: July 8, 2003

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No. 02-1623

In The

Supreme Court of the United States

TULARE COUNTY, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*, NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* BILL LOCKYER, ATTORNEY GENERAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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TABLE OF CONTENTS

Page

I. THE ISSUES PRESENTED BY TULARE COUNTY'S PETITION MERIT REVIEW BY THIS COURT 1

II. TULARE COUNTY IS NOT MAKING AN ABUSE OF DISCRETION CLAIM 3

III. PRESIDENTIAL COMPLIANCE WITH THE ANTIQUITIES ACT IS SUBJECT TO JUDICIAL REVIEW 5

IV. THE COURT HAS JURISDICTION TO REVIEW THE PROCLAMATION AND TO GRANT THE RELIEF SOUGHT AGAINST LESSER EXECUTIVE BRANCH OFFICIALS 9

V. THE ANTIQUITIES ACT IS UNCONSTITUTIONAL IF IT IS IMPOSSIBLE FOR A COURT TO "ASCERTAIN WHETHER THE WILL OF CONGRESS HAS BEEN OBEYED." 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Chamber of Commerce v. Reich, 74 F.3d 1332 (D.C. Cir. 1996) 9

Clinton v. Jones, 520 U.S. 681 (1997) 6

Dalton v. Specter, 511 U.S. 462 (1994) 6, 7, 8

Dugan v. Rank, 372 U.S. 609 (1963) 6

Franklin v. Massachusetts, 505 U.S. 788 (1992) 5, 7, 9

George S. Bush & Co. v. United States, 310 U.S. 371 (1940) 7, 8

In re Cheney, Nos. 02-5354, 02-5355, 02-5356, 2003 WL 21523362 (D.C. Cir., July 8, 2003) 5

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 6

Swan v. Clinton, 100 F.3d 973 (D.C. Cir. 1996) 9

Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002) 1, 2

Yakus v. United States, 321 U.S. 414 (1944) 10

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Art. IV, sec. 3, cl. 2 10

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* 5, 6, 7

Antiquities Act of 1906, 16 U.S.C. § 431 ..... *passim*

Federal Rules of Civil Procedure 8 1

Federal Rules of Civil Procedure 12(b)(6) 1, 2

Mandamus Act, 28 U.S.C. § 1361 5

I. The Issues Presented By Tulare County's Petition Merit Review By This Court.

Federal respondents' principal argument is that, at most, this case represents an isolated incident of the misapplication of an established pleading rule and because the court of appeals did not announce any new rule of law governing the pleading of federal claims, the outcome of this case will not affect the disposition of future cases. Federal respondents' brief at 8. This argument fails for two interrelated reasons. First, the record demonstrates that the court of appeals ignored the notice pleading standard of Fed. R. Civ. Pro. 8 and *sub silentio* applied a heightened pleading standard when it dismissed Tulare County's complaint for lack of specificity. This is in direct conflict with *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). Second, the ruling of the district court and the ruling of the court of appeals below are *radical departures from the accepted and usual course of judicial proceedings* involving the application of Rule 8 and Rule 12(b)(6) and therefore call for an exercise of this Court's supervisory power. Either of these reasons is sufficient to justify granting the petition.

The gravamen of Tulare County's complaint is that the President acted outside the scope of his authority under the Antiquities Act because he proclaimed a monument grossly in excess of the Act's express requirement that all monuments "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected" and a monument which far from protecting any objects, subjects them to a significantly increased risk of catastrophic fire. The complaint alleges that neither the President nor any subordinate officer of the Executive Branch ever made any assessment of the proper size of the monument measured against this standard (Petition, App. 78-App. 82 ¶¶ 131-153) and that the restrictions in the Proclamation against commercial timber sales significantly increase the risk of catastrophic fire and thus the danger to the Giant Sequoia trees and/or

other objects which may be within the vast monument area. Petition, App. 83-App. 84 ¶¶ 154-160. Under Rule 12(b)(6), these factual allegations, and all others in the complaint, must be taken as true for purposes of a motion to dismiss. The courts below ignored this principle and dismissed this case at the pleading stage without requiring the federal defendants to present so much as a single declaration in opposition to the allegations of the complaint. In doing so these courts became the first courts in the more than 80-year history of litigation challenging the creation of national monuments pursuant to the Antiquities Act to dismiss such a challenge at the pleading stage. Accordingly, this is a case of historic importance worthy of certiorari.

Even a cursory reading of the complaint demonstrates that contrary to the statement issued by the panel of the court of appeals upon denial of the petition for rehearing *en banc*, that panel obviously applied a heightened pleading standard, albeit *sub silentio, in contravention of this Court's decision in Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). If the court of appeals' *radical departure from the well-established standard of notice pleading* is allowed to stand in this case, the federal courts will be free to do this again in response to future Antiquities Act challenges. The Federal Rules of Civil Procedure do not permit such shortcuts regardless of how administratively convenient it may seem to a court to summarily dispose of a challenge to Presidential action in this manner.

As a practical matter, it will rarely if ever be possible for a plaintiff without knowledge of the specific objects to be protected and any explanation of how the boundaries of the monument were actually drawn to allege specifically in its complaint those precise areas of the monument unnecessary for the protection of those unspecified objects. Only on cross-motions for summary judgment or at trial can this level of specificity be brought before the court. Tulare County has been denied this fundamental opportunity.

If the district court's dismissal of the complaint in this action is allowed to stand under either the rationale of the district court (that the statements in the Proclamation are taken as true despite directly conflicting allegations in the complaint) or under the rationale of the court of appeals (that a complaint must allege with specificity all areas within a monument not necessary for the protection of whatever objects the President may have had in mind) then in the future, as a practical matter, there will no longer be any effective judicial review of presidential compliance with the express limitations of the Antiquities Act.

II. Tulare County Is Not Making An Abuse Of Discretion Claim.

The federal respondents characterize Tulare County's complaint as alleging that the President abused his discretion under the Act (federal respondents' brief at 9-10); however, the plain language of the Act and the allegations of the complaint demonstrate that this is not true. Of course, Tulare County does not dispute that the Act provides the President with broad discretion to determine, as an initial matter, whether or not to declare a national monument. Petition at 2. Thus, for example, no plaintiff would be able successfully to file a suit under the Act seeking a court order requiring the President to exercise his discretionary power to declare a monument, no matter how deserving such a monument might seem. From this, however, it does not follow that once the President has decided to declare a monument under the authority delegated to him by Congress, his compliance with the mandatory limitations of the Act also are not subject to judicial review. Put differently, once the President has decided to exercise his discretion to declare a monument, the Act *requires* that the President comply with specific standards, including that the monument protect identifiable objects of historic or scientific interest, and that the geographic limits of the monument "in all cases shall be

confined to the smallest area compatible with the proper care and management of the objects to be protected." Petition at 2. Federal respondents do not, nor could they, contend that compliance with these standards is optional or subject to the President's "discretion." Yet, it is precisely the President's failure to abide by these mandatory requirements (and not any putative abuse of discretion) that Tulare County challenges in its complaint.

Counts I, II, and III of the complaint read *reasonably and collectively* allege that the 327,769-acre monument is not the "smallest area compatible with the proper care and management of the objects to be protected" and that neither the President nor his subordinates within the Executive Branch have identified or located the particular objects that must be located so that the proper size of the monument may be established. Petition, App. 78-App. 82 ¶¶ 131-153. Count IV alleges that far from protecting any purported objects within the monument, the Proclamation actually significantly increases the risk of harm to the monument and its objects by increasing the risk of catastrophic fire in the monument area and strictly limiting the construction and use of roads and trails which are necessary for fire fighting. Petition, App. 83-App. 84 ¶¶ 154-160.

In addition, the increasing threat to the monument and any objects therein from catastrophic wildfire is a demonstrated fact. As set forth in the complaint, the Manter Fire burned an area twice the size of the District of Columbia in the Sequoia National Forest, quite near the monument. Petition, App. 77-App. 78 ¶¶ 127-129. Moreover, for three months last summer and fall the McNally Fire burned an area three times the size of the District of Columbia including lands within the monument and came within a mile of one of the Giant Sequoia Groves. *See* Petition at 8. These allegations go to the very heart of the mandatory requirements of the Antiquities Act. This case is not about an alleged abuse of discretion.

III. Presidential Compliance With The Antiquities Act Is Subject To Judicial Review.

Although federal respondents appear to argue that the courts do not have jurisdiction to determine whether the President has complied with the Antiquities Act, federal respondents have not challenged the district court's and the D.C. Circuit's implicit determination that they have such jurisdiction. Moreover, federal respondents do not identify a single case in which a court concluded that it was without jurisdiction to review the President's compliance with the Antiquities Act. In fact, as discussed in the Petition, of the six cases deciding claims under the Antiquities Act, including three decisions of this Court, none have been decided on a motion to dismiss. *See* Petition at 23-25.

When Congress wishes to preclude or limit judicial review of statutes, it must expressly do so. In the absence of any provision expressly precluding review, there is a strong presumption that Congress intended judicial review to be available. *See e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 816 (1992) (Stevens, J., concurring in part & concurring in the judgment). *See also*, *In re Cheney*, Nos. 02-5354, 02-5355, 02-5356, 2003 WL 21523362 (D.C. Cir., July 8, 2003) (Court affirmed district court's denial of motion to dismiss case challenging official acts of President and Vice President under statute that did not provide for judicial review and where Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (APA) did not apply. Court found jurisdiction under the Mandamus Act, 28 U.S.C. § 1361, a source of jurisdiction alleged in the instant case. *See* Petition, App. 50 ¶ 10). Although Congress was free to limit the scope of or entirely preclude judicial review (including non-statutory review) of actions under the Antiquities Act, it did not do so.

The government nevertheless argues that there is no statutory basis for Tulare County's claims because neither the Antiquities Act, the APA, nor any other federal statute authorizes judicial review of the President's compliance with the Antiquities Act so long as the President asserts in

the Proclamation that he has complied. Federal respondents' brief at 10. However, in *Dalton v. Specter*, 511 U.S. 462 (1994), a case relied upon by the federal respondents, this Court assumed that "even where judicial review is not available under the APA, some claims that the President violated a statute may nevertheless be judicially reviewable outside the framework of the APA." *Id.* at 474, *see also Clinton v. Jones*, 520 U.S. 681, 703 (1997). Federal respondents do not contend that the Antiquities Act is devoid of meaningful standards by which to judge whether or not in creating the Giant Sequoia National Monument the President acted within the law. To the contrary, they assert that the "statutory standards [of the Antiquities Act] meaningfully constrain the President's authority. . . ." Federal respondents' brief at 11. But if statements in the Proclamation are false, as the complaint in this case alleges, there is no meaningful constraint on the President without judicial review. Accordingly, the Court has authority to determine whether the President's conduct conformed to the requirements of the Act.[1]

In support of their contention that this Court lacks jurisdiction to decide this case on the merits, federal respondents rely on cases not involving the Antiquities Act and involving very different statutes which afford the President virtually unrestrained discretionary authority to act. For example, *Dalton v. Specter*, 511 U.S. 462 (1994), involved the Defense Base Closure and Realignment Act of 1990, in which Congress authorized the President to

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[1] Federal respondents' related suggestion that sovereign immunity bars Tulare County's cause of action (federal respondents' brief at 9) has also been rejected by this Court's holdings that sovereign immunity is no bar to suits alleging that an officer's actions are unconstitutional or beyond statutory authority because "those actions are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Dugan v. Rank*, 372 U.S. 609, 621-23 (1963).

approve or disapprove base closure recommendations in their entirety as contained in a report prepared by a Base Closure Committee. There, this Court found that the President's exercise of his unfettered discretion to simply approve or disapprove the base closure recommendations was not subject to judicial review. 511 U.S. at 476.

However, as Justice Blackmun's concurring opinion in *Dalton* makes clear, nothing in *Dalton* precludes judicial review of a claim that the President had acted outside of his statutory authority, for example by adding additional bases to the list of bases to be closed. *Id.* at 477-78 (Blackmun, J., concurring in part & concurring in the judgment).[2] In this case, Tulare County specifically alleged that the President determined the size and location of the monument without any attempt to comply with the limitations in the Antiquities Act and that the monument will not protect the putative objects. Thus, he acted outside of his statutory authority.[3]

George S. Bush & Co. v. United States, 310 U.S. 371 (1940), also does not support federal respondents' position. *George S. Bush & Co.* involved the Tariff Act of 1930, a depression-era statute which granted the President

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[2] The concurring opinion of Justice Souter, in which Justices Blackmun, Stevens, and Ginsburg joined, found that the structure of the 1990 Act at issue in *Dalton* demonstrated that Congress had specifically chosen to overcome "the strong presumption in favor of judicial review." *Id.* at 483-84 (Souter, J., concurring in part & concurring in the judgment). Nothing in the Antiquities Act suggests that Congress intended to abandon the presumption in favor of judicial review.

[3] The federal respondents' reliance on *Franklin v. Massachusetts*, 505 U.S. 788 (1992), is also misplaced. The passage from *Franklin* quoted by federal respondents relates to this Court's ruling that the President was not an "agency" within the meaning of that term in the APA and therefore the President's actions were "not reviewable for abuse of discretion under the APA." *Id.* at 801. As Tulare County does not raise an abuse of discretion claim under the APA, *Franklin's* ruling on this point has no bearing on this case.

unrestricted authority either to accept or reject recommendations for changes in tariff rates made by a Trade Commission, if in his sole judgment the recommended changes were "necessary to equalize [ ] differences in costs of production" between domestic and foreign companies. 310 U.S. at 376-77. The plaintiffs challenged the President's decision adopting rate changes recommended by the Commission on clams imported from Japan on the grounds that the Commission had used a formula by which it improperly converted invoice prices from yen to dollars. Significantly, the Court observed that the Tariff Act was silent as to the use of any such formula. *Id.* at 377-78. It was in this context that this Court ruled that it could not review the President's decision on a matter which was committed by statute to his sole judgment and concluded that "[h]ere the President acted in full conformity with the statute." *Id.* at 380.[4] Thus, unlike the Antiquities Act which imposes specific limitations on the size and scope of any national monument which may be proclaimed by the President, the Tariff Act contained no limitations on the manner in which the President was to decide whether changes recommended by the Commission were necessary to equalize differences in costs of production.

That Congress granted broad discretion to the President to approve or disapprove a particular tariff recommended by an independent commission at the height of the Great Depression in *George S. Bush* or unreviewable discretion to close military bases in *Dalton* and this Court upheld these narrow delegations of unfettered discretion

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[4] The Tariff Act, unlike the Antiquities Act, also contained a provision expressly limiting judicial review. Section 501 of the Tariff Act of 1930 limited appeals to "a question or questions of law only" (*George S. Bush*, 310 U.S. at 397 n.5), thus demonstrating that Congress intended a reduced level of judicial review which would not include any factual determinations.

lends no insight into the proper scope of a court's review of a President's actions under the Antiquities Act.

IV. The Court Has Jurisdiction To Review The Proclamation And To Grant The Relief Sought Against Lesser Executive Branch Officials.

Regardless of whether the federal courts have jurisdiction to grant relief directly against the President, this Court has recognized the propriety of reviewing the validity of Presidential directives, but granting relief against subordinate executive officers:[5]

> Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.

Franklin, 505 U.S. at 815, 112 S.Ct. at 2750 (Scalia, J., concurring in part & concurring in the judgment), *accord Chamber of Commerce v. Reich*, 74 F.3d 1332, 1328 (D.C. Cir. 1996); *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996). Federal respondents appear to concede this point in a footnote:

> The unavailability of judicial process to compel or prohibit the President's performance of an official act therefore does not provide an independent ground for dismissal of petitioners' suit or for denial of certiorari.

Federal respondents' brief at 6-7.

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[5] Plaintiffs have named the Secretary of Agriculture, the Chief of the Forest Service, the Regional Forester, and the Forest Supervisor as defendants.

V. The Antiquities Act Is Unconstitutional If It Is Impossible For A Court To "Ascertain Whether The Will Of Congress Has Been Obeyed."

The parties agree that on its face the Antiquities Act contains intelligible principles which limit the President's authority to proclaim national monuments. In addition, it seems readily apparent that the President's compliance with those intelligible principles must be subject to meaningful judicial review, otherwise these principles are meaningless and the Antiquities Act is an unconstitutional delegation of Congress' power under the Property Clause of the Constitution. *Yakus v. United States*, 321 U.S. 414, 426 (1944). The Proclamation asserts, without more, that the monument is the smallest size required by the Antiquities Act. The complaint in this case alleges, among other things, that this assertion in the Proclamation is false. A mere facial review of the Proclamation as conducted by the district court cannot provide the requisite assurance that "the will of Congress has been obeyed."

CONCLUSION

The petition for a writ of certiorari should be granted.

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